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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1958

No. 394

KINGSLEY INTERNATIONAL PICTURES CORPORATION, APPELLANT,

vs.

THE REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

FILED SEPTEMBER 23, 1958
JURISDICTION NOTED NOVEMBER 24, 1958

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK, THIRD JUDICIAL DEPARTMENT

In the Matter of the Application of

KINGSLEY INTERNATIONAL PICTURES CORPORATION, Petitioner,

For an Order pursuant to Article 78 of the Civil Practice Act,

against

THE REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, Respondents.

STATEMENT UNDER RULE 234.

Proceeding to review, pursuant to Article 78 of the Civil Practice Act, a determination of the Regents and of the Motion Picture Division of the New York State Education Department refusing a license for the exhibition of the film "Lady Chatterley's Lover" and for an order, judgment or decree declaring that the sections of Part II of Article 3 of the Education Law of the State of New York contravene the Constitution of the United States and the Constitution of the State of New York and are, therefore, null and void.

The parties are as stated above and there has not been any change of parties or attorneys since the commencement of this action on October 11, 1956.

[fol. 7]

IN THE SUPREME COURT OF NEW YORK
COUNTY OF ALBANY

PETITION TO THE SUPREME COURT OF THE STATE OF NEW YORK FOR ORDER GRANTING REVIEW—October 11, 1956

To the Supreme Court of the State of New York:

The petition of Kingsley International Pictures Corporation respectfully alleges:

1. Kingsley International Pictures Corporation (hereafter referred to as Kingsley) is a corporation organized and existing under the laws of the State of New York, with its principal offices at 1501 Broadway, New York City, New York.

2. At all times hereinafter mentioned, Petitioner was and still is engaged in the business of distributing motion picture films, which business consists of purchasing motion picture films and the right to exhibit such films publicly and the leasing of films for profit to owners and operators of theatres in the United States and its territories.

3. Heretofore Petitioner acquired the exhibition rights to the motion picture film "Lady Chatterley's Lover" (sometimes hereinafter referred to as "the picture" and sometimes as "the film"), and Petitioner at all times hereinafter mentioned had and still has the sole right to exhibit the film or to lease it for exhibition in the State of New York.

4. The film is based on the novel of the same name by D. H. Lawrence, one of the greater writers of the twentieth century. The film is a faithful translation to the medium of [fol. 8] moving pictures of the expurgated version of the novel, which version is freely sold and purchased at book stores and news stands in the State of New York.

5. Prior to May 7, 1956, Petitioner applied, pursuant to Article 3 of the Education Law of the State of New York, to the Motion Picture Division of the New York State Education Department, (hereafter referred to as the "Division") for a license to publicly exhibit the picture for pay in the State of New York.

6. On May 7, 1956, the Division refused Petitioner a license to exhibit the film as submitted unless three specified scenes or sequences were deleted.

7. On or about May 31, 1956, Petitioner requested the Regents to review the aforesaid denial of a license for the exhibition of the film and thereafter on September 28, 1956, the Regents affirmed the determination of the Division on the ground that the three sequences objected to by the Division are immoral and on the further ground that the picture as a whole is immoral.

8. Attached hereto and made part hereof are:

(1) the Petition of Petitioner to the Regents requesting review of the Division's denial of the license for the exhibition of "Lady Chatterley's Lover," (designated as Exhibit A);

(2) the Answer of the Director of the Division to the aforementioned Petition to the Regents, (designated Exhibit B); and

[fol. 9] (3) the order of the Regents affirming the action of the Division and denying a license for the exhibition of the film (designated Exhibit C).

The film itself, the script and the application for a license are also made part of this Petition as if physically attached hereto. And the allegations of petitioner in Exhibit A are here iterated and realleged with the same force and effect as if herein set forth in full.

9. On information and belief, the license fees collected by the Division pursuant to section 126 of the Education Law of the State of New York are in excess of the amount expended in administering the motion picture licensing system provided for in Part II of Article 3 of the Education Law.

10. As a result of the determination made by the Regents and the Division that the film "Lady Chatterley's Lover" is immoral, petitioner may not exhibit the film publicly for profit, or sell, lease or lend the same for exhibition at any theatre in the State of New York.

11. Petitioner contends:

(1) The determination by the Regents that the film "Lady Chatterley's Lover" is "immoral" is arbitrary, unwarranted, unreasonable and unjust.

(2) That determination by the Division and the Regents that the 3 sequences referred to in the letter [fol. 10] of the Division dated May 7, 1956 attached to Exhibit A are "immoral," is arbitrary, unwarranted, unreasonable and unjust.

(3) The Division and the Regents erred in failing to consider the film's artistic merit and sincerity of purpose.

(4) Part II, of Article 3, of the Education Law of the State of New York, pursuant to which the Division and the Regents refused a license for the exhibition of "Lady Chatterley's Lover," provides for a system of licensing and prior censorship of communications and the press, and therefore contravenes the First and Fourteenth Amendments to the Constitution of the United States, and Article 1, section 8, of the Constitution of the State of New York.

(5) Sections 122 and 122-a of the Education Law of the State of New York contravene the First and Fourteenth Amendments to the Constitution of the United States, and Article I, Section 8, of the New York State Constitution in that they permit the suppression of moving pictures that present opinions unacceptable to the Division or to the Regents.

(6) Section 122 of the Education Law of the State of New York which, in effect, provides that a motion picture film found to be "immoral" shall not be licensed for exhibition, and Section 122-a of the Education Law of the State of New York which purports to define the term "immoral" as used in Section 122, are so vague [fol. 11] and indefinite that their enforcement and application in this case deprived Petitioner of property rights without Due Process of Law, and the said statutes are void, being in violation of the Fourteenth Amendment to the Constitution of the United States and of Article 1, Section 6, of the Constitution of the State of New York.

(7) Section 126 of the Education Law of the State of New York, which provides for the payment of fees for licenses to exhibit motion picture films in the State of New York, imposes a tax on the right of communication by means of motion picture films, and therefore violates the First and Fourteenth Amendments to the Constitution of the United States, and Article 1, section 8 of the Constitution of the State of New York.

13. No previous application for the order herein requested or the relief herein sought has been made to any other court or judge.

Wherefore, petitioner respectfully prays:

(1) For a review under Article 78 of the Civil Practice Act of the determination and order of the Regents and of the Motion Picture Division refusing a license for the exhibition of the film "Lady Chatterley's Lover;"

(2) For an order annulling the determinations of the Regents and the Motion Picture Division;

(3) For an order, judgment or decree declaring that the sections of Part II of Article 3 of the Education [fol. 12] Law of the State of New York contravene the First and Fourteenth Amendments to the Constitution of the United States and sections 6 and 8 of Article 1 of the Constitution of the State of New York, and are therefore null;

(4) For an order directing that upon the answer and the return of the Respondents being filed, the proceedings be transferred for disposition to a term of the Appellate Division of the State of New York, for the Third Department; and

(5) For such other and further relief as to the Court may seem just and proper.

Dated: New York, October 11th, 1956.

Yours, etc.,

Kingsley International Pictures Corporation, By (sgd) Edward Kingsley, President.

London, Simpson & London, Attorneys for Petitioner, Office & P. O. Address, 150 Broadway, New York 38, N. Y.

[fol. 14]

EXHIBIT A TO PETITION

PETITION TO THE REGENTS

Appeal to the Board of Regents

by

KINGSLEY INTERNATIONAL PICTURES CORPORATION

From the Determination of the Director of the Motion Picture Division to deny a license for the exhibition of the film "LADY CHATTERLEY'S LOVER".

TO THE BOARD OF REGENTS:

The Petitioner, KINGSLEY INTERNATIONAL PICTURES CORPORATION, respectfully alleges:

1. KINGSLEY INTERNATIONAL PICTURES CORPORATION (hereafter referred to as Kingsley) is a corporation organized and existing under the laws of the State of New York, with its principal offices at 1501 Broadway, New York City, New York.

2. KINGSLEY is the owner of the right to exhibit the motion picture "LADY CHATTERLEY'S LOVER" in the United States.

3. Pursuant to Article 3, Part II, of the Education Law, and the Regents' Rules & Regulations for Review & Licensing of Motion Pictures, KINGSLEY duly applied to the Mo-[fol. 15] tion Picture Division of the State Education Department (hereafter referred to as the Division) for a license to exhibit the film "LADY CHATTERLEY'S LOV.. :" in the State of New York. The application for a license was accompanied by the film script and a certified check in the amount of the license fee.

4. On May 7, 1956, the Acting Director of the Division directed the elimination of certain views, sequences, dialogue and super-imposed titles from "LADY CHATTERLEY'S

LOVER" on the ground that they are "immoral." A copy of the letter directing the deletions is annexed hereto and made part hereof as Exhibit "A". Such letter is in effect a notice that a license will not be issued unless the views are eliminated.

5. Petitioner seeks a review by the Board of Regents of the Division's refusal to license the picture "LADY CHATTERLEY'S LOVER." The review is sought on the grounds:

(a) That the views, sequences, dialogue and titles objected to by the Division are not immoral within the meaning of Sections 122 and 122-a of the New York Education law;

(b) That the standards by which the Division judged "LADY CHATTERLEY'S LOVER" are improper;

(c) That the Division exceeded its authority in denying a license for the exhibition of "LADY CHATTERLEY'S LOVER";

(d) That the Division, in directing the deletion of the parts of the film listed in Exhibit A, acted inconsistently, arbitrarily and capriciously.

[fol. 16] 6. Petitioner believes that the film "LADY CHATTERLEY'S LOVER" is moral in its theme, and in the manner of presentation, and that none of its parts, including those objected to by the Division, is immoral. It deals with the relationships of a woman (Lady Chatterley) with her husband (Sir Clifford Chatterley) and with her lover (Mellors). The husband is physically crippled and spiritually corrupt. The lover is a symbol of the simple, decent and natural man. In the denouement, Lady Chatterley, unable to secure her husband's consent to divorce, sacrifices wealth and social status to go with Mellors. Her relationship with Mellors, although not sanctioned by law, is portrayed as a true marriage. The solution of similar problems in a number of pictures approved by the Division, is the death of the husband by fortuitous accident, suicide or murder. It is submitted that "LADY CHATTERLEY'S LOVER" is more honest and moral than such films approved and licensed by the Division without reservation.

The scenes between Lady Chatterley and Mellors objected to by the Division are clearly not lewd. It must be assumed that the Division takes exception to them because the protagonists are unmarried. The determination that the relationship between Lady Chatterley and Mellors is improper was arrived at without regard to the intent or purpose of the film. Such determination involves a judgment with respect to the mores of the community that the Division is not qualified or legally authorized to make.

7. The Division erred in judging the entire film on the basis of a few isolated passages. It is submitted that a [fol. 17] film must be judged as an entirety, and that is particularly true where the basis for judgment is a moral one. Judged by isolated passages taken out of context, the Bible would be found immoral and obscene. The Division does not claim that the picture as a whole—or that its effect—is immoral. It may not, therefore, ban the picture because of objection made to a very minor part of it.

8. The Division exceeded the limits of its authority in refusing a license for the exhibition of "Lady Chatterley's Lover." In the most recent and controlling decision on the question (*Capitol Enterprises, Inc.* v. *The Regents*), the Appellate Division for the Third Department limited the power of the Division to reject an application for license to exceptional, or flagrant cases. Certainly, "Lady Chatterley's Lover" does not present such a case. Its purpose is sincere. It is presented with taste—and artistry. There is no exploitation of nudity or of the sensational. And even the objections to it listed by the Division are relatively minor ones. The Division's rejection of the request to license the picture was, therefore, in direct violation of the law.

9. The Division acted arbitrarily, inconsistently and capriciously in demanding the elimination of the portions of the film listed in Exhibit A. In countless instances, the Division has licensed films containing sequences that it declared objectionable in this film. A few such films, to list those that immediately come to mind, are "A Husband for Anna," "Devil in the Flesh," "Eternal Return," and "Marie Duport."

[fol. 18] 10. Petitioner also contends that the statutes and regulations providing for the submission of films for license, and their application in this case, violate the rights guaranteed by the First, Fifth and Fourteenth Amendments to the Constitution of the United States, and Sections 6 and 8 of Article I of the Constitution of the State of New York. In the event the decision of the Division to ban "LADY CHATTERLEY'S LOVER" is upheld by the Regents, Petitioner will seek an order or decree, from the court having jurisdiction, declaring that the New York film censorship law (Sections 122 and 122-a of the New York Education Law) contravenes the Constitution of the United States and the Constitution of the State of New York, and is, therefore, null and void.

11. In the exercise of its editorial judgment and to enhance the artistic quality of the film, Petitioner has deleted certain material from the version of "LADY CHATTERLEY'S LOVER" submitted to the Division. The deletions include a small part of the matter in Reel 3D objected to by the Division. Petitioner requests the Regents, in reviewing the action of the Division, to consider the version as revised by Petitioner. If the request is denied, Petitioner will present to the Regents the version submitted to the Division. The regents are also respectfully requested, in reviewing the determination of the Division, to take cognizance of the rule (enunciated in *Capitol Enterprises, Inc.* v. *The Regents*) that the burden is on the Division to justify its refusal to license the exhibition of the picture "LADY CHATTERLEY'S LOVER."

[fol. 19] 12. For the reasons outlined, Petitioner requests the BOARD OF REGENTS to direct the issuance of a license for the exhibition of the motion picture "LADY CHATTERLEY'S LOVER."

Dated, New York, May 31, 1956.

KINGSLEY INTERNATIONAL PICTURES CORPORATION

By (sgd) EDWARD L. KINGSLEY

EDWARD L. KINGSLEY
President

[fol. 21]

EXHIBIT A TO EXHIBIT "A" TO PETITION

EXHIBIT ATTACHED TO PETITION TO THE REGENTS

THE UNIVERSITY OF THE STATE OF NEW YORK

THE STATE EDUCATION DEPARTMENT

Motion Picture Division
State Building
80 Centre Street
New York 13, N. Y.

May 7, 1956

HELEN H. KELLOGG, Acting Dir.

KINGSLEY INTERNATIONAL PICTURES CORP.
1501 Broadway
New York 36, New York

Re: *"Lady Chatterley's Lover"*
(French with English Titles)

Attn: *Mr. Edward L. Kingsley*

Gentlemen:

The motion picture identified above has been examined by this Division under the provisions of Section 122 of the State Education Law.

In accordance with the report and recommendations of our Reviewers, the following eliminations are directed to be made in all prints to be exhibited in the State of New York.

REEL 2D:

Eliminate all views of Mellors and Lady Chatterley in cabin from point where they are seen lying on cot together, in a state of undress, to end of sequence.

[fol. 22] REEL 3D:

Eliminate all views of Mellors caressing Lady Chatterley's buttock and all views of him unzipping her dress and caressing her bare back. Eliminate following spoken dialogue accompanying these actions:

"Mais tu es nue . . .	"But you're nude . . .
Tue es nue sous ta robe,	you're nude under your
et tu ne le disais pas . . .	dress, and you didn't
Qu'est-ce que tu as?"	say so . . . What is it?"

Eliminate accompanying English superimposed titles:

"You have nothing on . . . "
"And you didn't say so . . . "
"What is it?"

REEL 4D:

Eliminate entire sequence in Mellors' bedroom, showing Lady Chatterley and Mellors in bed, in a state of undress.

REASON: "Immoral" within the intent of our Law.

When the prescribed eliminations have been made, please return reels 2D, 3D and 4D to us for rescreening.

Very truly yours,

(Sgd.) HELEN H. KELLOGG
Acting Director

[fol. 23]

EXHIBIT B TO PETITION

ANSWER TO THE PETITION TO THE REGENTS

IN THE MATTER

of the

Appeal from the action of the Acting Director of the Motion Picture Division in refusing to license for general exhibition a motion picture entitled:

"LADY CHATTERLEY'S LOVER"

TO THE BOARD OF REGENTS:

HELEN H. KELLOGG, Acting Director of the Motion Picture Division of the State Education Department, here-

inafter referred to as the Division, for answer to the appeal herein, admits, denies and alleges as follows:

1. Denies any knowledge to the identity and place of business of the petitioner other than that contained in the application of Kingsley International Pictures Corp., (hereinafter referred to as Kingsley), for the licensing for general exhibition of the motion picture "LADY CHATTERLEY'S LOVER."

2. Denies any knowledge as to the identity of the signer of the petition other than that contained in statements in the application of Kingsley International Pictures Corp.

3. Admits the allegations contained in paragraph numbered 3 of the petition on appeal.

[fol. 24] 4. Admits the allegations contained in paragraph numbered 4 of the petition on appeal.

5. Denies the allegations as contained in paragraph numbered 5a, 5b, 5c and 5d of the petition on appeal herein and alleges:

(a) That the views, sequences, dialogue and titles objected to by the Division are immoral within the meaning of Section 122 and 122-a of the New York State Education Law;

(b) That the action taken by the Division in directing that eliminations be made in "LADY CHATTERLEY'S LOVER" is proper and consistent with the provisions of Section 122 and 122-a of the New York State Education Law;

(c) That the Division exercised a proper authority in directing the elimination of those portions of the film which contravene the statute, and

(d) That the Division in directing the elimination of the parts of the film listed in petitioner's Exhibit A of the petition acted neither inconsistently, arbitrarily nor capriciously and that said action is in fact mandatory under Section 122 and 122-a of the New York State Education Law.

6. With respect to paragraph numbered 6 of the petition, denies knowledge or information sufficient to form a belief as to petitioner's allegation that he believes the film "LADY CHATTERLEY'S LOVER" is moral in its theme, and further denies all other allegations in this paragraph, except admits [fol. 25] that this is a story of a young woman, Lady Chatterley, and her relationship with Sir Clifford Chatterley, her crippled husband, and her lover Mellors, a young gamekeeper of their estate. Sir Clifford because of war injuries is impotent. He informs his wife that he would wish her to have a child by another man so that he could have an heir to inherit his title and estate. Lady Chatterley at first resents the idea of having a purely sexual relationship with another man. Nevertheless she finds herself physically attracted to their gamekeeper, Mellors, and becomes involved in a protracted, illicit love affair with him. There ensue several clandestine meetings, as a result of which Lady Chatterley becomes pregnant with Mellors' child. Despite a temporary quarrel with Mellors, Lady Chatterley is so strongly attracted to him that she decides to leave her husband. Denying Lady Chatterley's request for a divorce, Sir Clifford demands that she allow him to acknowledge the expected child as his, to raise a "Chatterley." She refuses, and leaves to live with her lover, Mellors.

In requesting eliminations, the Division was concerned only with those portions of the film which constituted a portrayal of immorality within the meaning of Section 122 and 122-a of the New York State Education Law.

7. With respect to paragraph numbered 7 of the petition, denies that the Division judged the entire film on basis of a few isolated passages. The entire film was not banned and only those portions found to be immoral within the meaning of the statute are the subject of the action taken by the Division.

[fol. 26] 8. With respect to paragraph numbered 8 of the petition, denies that the Division exceeded the limits of its authority and alleges that it has noted in cognizance of and in conformance with the judgments of the Appellate Division in *Capitol Enterprises Inc.* vs. *the Regents* and so alleges:

(a) That views of a man and woman on a cot together in a state of undress, caressing each other subsequent to an illicit act of sexual intercourse;

(b) That views of a man caressing a woman's buttock, unfastening her clothing and caressing her erotically, accompanying this action with dialogue indicating that she is wearing no underclothing, and

(c) That views of a man and woman in bed together, apparently nude, subsequent to a night of illicit sexual love,

constitute such exceptional and flagrant cases as were within the contemplation of the court in its opinion (*supra*). Alleges further that the petitioner's allegations regarding the artistry, good taste and purpose of the subject film are irrelevant.

9. With respect to paragraph numbered 9 of this petition, denies that the Division acted arbitrarily, inconsistently and capriciously in demanding the elimination of the portions of the film listed in Exhibit A of this petition; denies that the previously licensed films cited represent exact cases in point and denies that standards were set by the previous [fol. 27] actions taken on these cited films which are now being violated to the detriment of the petitioner.

1. Denies the allegations set forth in paragraph numbered 10 of the petition.

WHEREFORE your respondent urges that the appeal herein be dismissed and that the action of the Motion Picture Division and the Acting Director of such Division be affirmed.

(Sgd.) HELEN H. KELLOGG.

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

HELEN H. KELLOGG, being duly sworn, deposes and says that she in the Acting Director of the Motion Picture Division of the State Education Department; that she is the respondent in the above entitled appeal; that she has

read the foregoing answer and knows the contents thereof and that the same is true to the knowledge of deponent except as to the matters therein stated to be alleged upon information and belief, and as to those matters, she believes it to be true.

(sgd) HELEN H. KELLOGG

HELEN H. KELLOGG

Sworn to before me this
19th day of June, 1956.

TERESA G. ASKIN
Notary Public, State of New York
No. 24-0105950
Certified in Kings Co.
Cert. filed in New York County
Commission Expires March 30, 1957

[fol. 28]

EXHIBIT C TO PETITION

OPINION AND ORDER OF THE BOARD OF REGENTS

[STATE SEAL] No. 6245

THE UNIVERSITY OF THE STATE OF NEW YORK

IN THE MATTER

of the

Appeal of Kingsley International Pictures Corporation from the determination of the Motion Picture Division of the State Education Department denying a license for the exhibit of the film

"LADY CHATTERLEY'S LOVER."

London, Simpson & London, Esqs.
Attorneys for Petitioner

This is an appeal to the Regents by the Kingsley International Pictures Corporation from the determination of

the Motion Picture Division of the State Education Department denying a license for the exhibition of the film "Lady Chatterley's Lover."

In our opinion, the Motion Picture Division correctly held that the three sequences specifically referred to by said Division are immoral under the provisions of sections 122 and 122-a of the Education Law.

[fol. 29] Moreover, in our opinion, the whole theme of this motion picture is immoral under said law, for that theme is the presentation of adultery as a desirable, acceptable and proper pattern of behavior.

In its petition to us the petitioner states that this motion picture is "moral in its theme" and that the relationship of the principals, "although not sanctioned by law, is portrayed as a true marriage." Supporting the position thus taken by the petitioner, its attorney in his argument before us admitted that adultery is the theme but points to the Kinsey report as authority for the view that "the majority of moral people commit adultery."

We rest our determination upon the fundamental recognition by our society that adultery is condemned by both God-given law (Sixth Commandment given to Moses on Mount Sinai) and man-made law (sections 100-103 of the Penal Law).

In line after line and in sequence after sequence, this motion picture glorifies adultery and presents the same as desirable, as acceptable and as proper. We can not put our seal of approval upon such a motion picture, a seal which would permit its showing in the amusement theatres of the State, a seal which would accord immunity from criminal prosecution under section 1140-a of the Penal Law.

For these reasons, as well as for those stated by the Motion Picture Division, the action of the Motion Picture [fol. 30] Division is affirmed, this appeal is dismissed and the license is denied.

In Witness Whereof, we, a duly constituted Committee of the Board of Regents, appointed pursuant to the provisions of Section 124 of the Education Law of the State of New York, do hereunto set our hands and affix the seal of the

University of the State of New York, at the City of Albany, this 28th day of September, 1956.

GEO. L. HUBBELL, JR.
JOHN F. BROSNAN
JACOB L. HOLTZMAN
Committee of the Board of Regents

(SEAL)

AFFIDAVIT OF VICTOR WEYBRIGHT IN SUPPORT OF PETITION

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

Victor Weybright, being duly sworn, deposes and says:

1. I am the Chairman of the Board of Directors of the New American Library of World Literature, Inc., (hereinafter referred to as "New American"), which has its principal offices at 501 Madison Avenue, New York City, N. Y.

[fol. 31] 2. New American is the publisher of an edition of D. H. Lawrence's novel "Lady Chatterley's Lover" (hereafter referred to as the "edition"). The edition was first published by New American in 1946 by arrangement with Alfred A. Knopf, Inc. I have initialed a copy of the edition for the purposes of identification, in the event its use is deemed necessary in the above entitled proceedings.

3. From September, 1946, to date, approximately 1,252,000 copies of the edition have been sold. One cannot state the exact number of copies of the edition that have sold in the State of New York. Based on New American's statistics, I think I can state with reasonable accuracy that more than 160,000 copies of the edition have been sold within the State of New York.

4. Since its publication in 1946, the edition has been sold and distributed throughout the State of New York without any interference or attempted interference by any government official or agency.

Victor Weybright

(Sworn to before Sherman P. Kimball, November 29, 1956.)

[fol. 32]

IN THE SUPREME COURT OF NEW YORK

STIPULATION AMENDING PETITION TO THE SUPREME COURT

It Is Hereby Stipulated and Agreed that the petition of Kingsley International Pictures Corporation to the Supreme Court in this proceeding, dated October 11, 1956, be and the same hereby is amended by the addition of the following subdivision (8) to Article 11 of the said petition:

> "(8) The determination of the Regents that the film "Lady Chatterley's Lover" is immoral is contrary to the evidence, and the verdict of a jury to that effect rendered in an action in the Supreme Court of the State of New York triable by a jury would properly be set aside by the court as contrary to the weight of evidence."

Dated, New York, N. Y., November 20, 1956.

London, Simpson & London, Attorneys for Petitioner.

Jacob K. Javits, Attorney General of the State of New York. Charles A. Brind, Jr., Counsel, Board of Regents of the State of New York, Attorneys for Respondents.

[fol. 33]

IN THE SUPREME COURT OF NEW YORK

ANSWER OF THE BOARD OF REGENTS TO THE PETITION TO THE SUPREME COURT

The respondents by their attorneys herein answering the petition of the petitioner herein respectfully allege as follows:

First—Upon information and belief admit the allegations contained in paragraphs of the petition numbered "1", "2" and "3".

Second—Deny the allegations contained in paragraph of the petition numbered "4" except that respondents admit

that the film "Lady Chatterley's Lover" purports to be based on the novel of the same name by D. H. Lawrence and upon information and belief admit that an expurgated version of such novel is sold in the State of New York.

Third—Admit the allegations contained in paragraphs of the petition numbered "5", "6", "7" and "10" of the petition herein.

Fourth—Deny each and every allegation contained in paragraph of the petition numbered "11".

Fifth—Admit the allegations contained in paragraph of the petition numbered "8" except that as to petitioner's statement that the allegations of petition to the Board of Regents are realleged as though set forth in full therein, respondents deny all of such allegations as are inconsistent with the finding of the respondents as set forth in their determination.

[fol. 34] Sixth—Upon information and belief deny each and every allegation contained in paragraph numbered "9" of the petition except admit that fees are collected in conformity with the Education Law and the Rules of the Board of Regents, and except further that reference is made to the appropriations by the Legislature of the State of New York as shown in the annual budgets adopted by the Legislature for the substance thereof as indicating the amounts expended in administering the Motion Picture Licensing System, pursuant to the Education Law.

Further Answering the Petition and as a First, Separate and Complete Defense thereto, the Respondents Allege:

Seventh—That the respondents, the Board of Regents of the University of the State of New York, are vested, pursuant to Article V, Section 4, and Article XI, Section 2 of the Constitution of the State of New York and Part II of Article III of the Education Law, with the duty of licensing motion picture films and pursuant to such duty and authority said respondents are vested with the power, authority and jurisdiction to make the determination herein complained of.

Further Answering the Petition and as a Second, Separate and Complete Defense thereto, the Respondents Allege:

Eighth—That the hearings and proceedings in this matter were legally held pursuant to Section 206 of the Education Law.

[fol. 35] Further Answering the Petition and as a Third, Separate and Complete Defense thereto, the Respondents Allege:

Ninth—That even if the revenue collected for the licensure of motion picture films is a tax, such tax does not contravene the First and Fourteenth Amendments of the Constitution of the United States and Article I, Section 8 of the Constitution of the State of New York.

Tenth—Returned herewith and made a part hereof are the following exhibits:

Special Term Exhibit 1—Petition of Kingsley International Pictures Corporation to the Board of Regents.

Special Term Exhibit 2—Answer of Motion Picture Division.

Special Term Exhibit 3—Transcript of Argument before Committee of the Board of Regents.

Special Term Exhibit 4—Copy of opinion of Committee of the Board of Regents affirming determination of the Director of the Motion Picture Division.

Special Term Exhibit 5—Copy of the vote of the Board of Regents on September 28, 1956, affirming the determination of the Director of the Motion Picture Division.

Objections in Point of Law

1. The petition herein does not state facts sufficient to constitute a cause of action.

Wherefore the respondents pray for an order dismissing the petition herein on the merits together with costs and

[fol. 36] disbursements, and for such other and further relief as to this Court may seem just and proper.

Jacob K. Javits, Attorney General of the State of New York, Office & P. O. Address, State Capitol, Albany, New York. Charles A. Brind, Jr., Counsel to the Board of Regents of the University of the State of New York, Office & P. O. Address, State Education Building, Albany, New York, Attorneys for Respondents.

(Verified by James E. Allen, Jr., Commissioner of Education of the State of New York and the executive officer of the Board of Regents of the University of the State of New York, November 15, 1956.)

[fol. 38]

EXHIBIT 5 TO ANSWER

EXTRACT FROM JOURNAL OF REGENTS MEETING
September 28, 1956

LADY CHATTERLEY'S LOVER

After review of the motion picture film entitled "Lady Chatterley's Lover" and a full and careful discussion of the matter, upon the recommendation of the committee appointed for such purpose it was

Voted, That the determination of the Acting Director of the Motion Picture Division, denying a license for the exhibit of the motion picture film entitled "Lady Chatterley's Lover" on the ground the said film is "immoral" within the meaning of the provisions of Sections 122 and 122-a of the Education Law, is affirmed.

[fol. 39]

IN THE SUPREME COURT OF NEW YORK

STIPULATION AS TO FACTS—November 20, 1956

The parties hereto by their attorneys hereby stipulate that for the purposes of this proceeding only:

1. That the petitioner heretofore acquired the exhibition rights to the motion picture film "Lady Chatterley's Lover".

2. During the fiscal periods enumerated, the total sums collected (pursuant to Education Law, sec. 126) by the Motion Picture Division from applicants for licenses and permits to exhibit motion picture films were:

Period	Total Amount Collected
4/1/49 to 3/31/50	$376,614.50
4/1/50 to 3/31/51	388,940.00
4/1/51 to 3/31/52	458,323.50
4/1/52 to 3/31/53	418,481.00
4/1/53 to 3/31/54	398,979.50
4/1/54 to 3/31/55	421,126.25
4/1/55 to 3/31/56	433,559.00

3. During the fiscal periods enumerated, the following amounts were appropriated and expended directly in maintaining the Motion Picture Division:

	Appropriation	Expenditure
4/1/49 to 3/31/50	$ 92,960.00	$ 81,936.64
4/1/50 to 3/31/51	99,592.00	86,223.27
4/1/51 to 3/31/52	99,157.00	92,556.50
4/1/52 to 3/31/53	104,267.00	102,370.91
4/1/53 to 3/31/54	114,630.00	112,327.05
4/1/54 to 3/31/55	116,550.00	114,826.82
4/1/55 to 3/31/56	121,290.00	103,550.41

[fol. 40]

	Replacements		Additional	
	Appropriation	Expenditure	Appropriation	Expenditure
4/1/50	$2,070.00	$2,070.00	$ 40.00	$ 31.85
4/1/53	870.00	868.50	180.00	164.46

Equipment Replacement

	Appropriation	Expenditure
4/1/55 to 3/31/56	$22,825.00	$22,756.93

Alterations—Projection Room

	Appropriation	Expenditure
4/1/55 to 3/31/56	$17,800.00	$17,800.00
4/1/55 to 3/31/56	482.31	482.31

It is expressly agreed and stipulated that the aforesaid merely indicates the moneys directly appropriated to the Motion Picture Division of the State Department of Education and expended directly in maintaining said Division, and do not include and are not purported to include in any sense other moneys, the amounts of which have not been ascertained or estimated, expended by the State of New York through other bureaus, divisions, officers and employees of the State Department of Education and through other employees, officers, departments, instrumentalities and divisions of government of the State in connection with the exhibition of motion pictures in the State.

It is further agreed that this stipulation is made without prejudice to the rights of either party in any other action [fol. 41] or proceeding, and may not be used in any other action or proceeding.

Dated, Albany, New York, November 20, 1956.

London, Simpson & London, Attorneys for Petitioner Kingsley International Pictures Corporation.

Jacob J. Javits, Attorney General of the State of New York. Charles A. Brind, Jr., Counsel, Board of Regents of the State of New York, Attorneys for Respondents.

[fol. 42]

IN THE SUPREME COURT OF NEW YORK

STIPULATION WITH RESPECT TO EXHIBITS—December 10, 1956

It is hereby stipulated and agreed that the motion picture film "Lady Chatterley's Lover" and the three photographs offered in evidence upon the argument before the Regents shall be deemed a part of the record on appeal in this appeal, and the aforesaid film, or any part or parts thereof, shall, if request is made by the Court, be exhibited on the argument of this appeal, and the aforesaid photographs may be physically submitted to the Court by either party upon the argument of this appeal.

It is further stipulated and agreed that the transcript of the argument of counsel before the Committee of the

Board of Regents (Exhibit 3 attached to Respondents' Answer) be omitted from the printed Record of Proceedings in this matter.

Dated, December 10, 1956.

London, Simpson & London, Attorneys for Petitioner-Appellant.

Jacob K. Javits, Attorney General of the State of New York. Charles A. Brind, Jr., Counsel Board of Regents of the State of New York, Attorneys for Respondents.

[fol. 47]

At a Term of the Appellate Division of the State of New York, held in and for the Third Judicial Department, in the City of Albany, N. Y., commencing on the 21st day of January, 1957.

Present:

Hon. Sydney F. Foster, Presiding Justice.

Hon. Francis Bergan, Hon. William H. Coon, Hon. Philip Halpern, Hon. James Gibson, Associate Justices.

In the Matter

of

The Application of Kingsley International Pictures Corporation, Petitioner,

For an Order Pursuant to Article 78 of the Civil Practice Act,

against

The Regents of the University of the State of New York, Respondents.

Appellate Division Order Appealed From

An application having been made by Kingsley International Pictures Corporation, the petitioner in this proceed-

ing, to review the determination of the respondents, the Regents of the University of the State of New York, sus- [fol. 48] taining the refusal of the Motion Picture Division of the State Department of Education to license the motion picture "Lady Chatterley's Lover," and said application having regularly come on to be heard at a Special Term of the Supreme Court held in and for the County of Albany, before the Hon. Isidore Bookstein, and that Court, by an order dated November 21, 1956, having transferred this proceeding to the Appellate Division of the Supreme Court, Third Judicial Department, for disposition pursuant to section 1296 of the Civil Practice Act; and said proceeding having been duly brought to argument at the above term;

Now, on reading and filing the notice of proceeding dated October 11, 1956, the petition duly verified October 11, 1956, and the exhibits annexed thereto, the answer of the respondents duly verified November 15, 1956, with the exhibits annexed thereto, and upon all the other papers and proceedings heretofore had herein; and after hearing Ephraim S. London, of counsel for the petitioner, in support of the said application, and Dr. Charles A. Brind, Jr., attorney for the respondents, in opposition thereto; due deliberation having been had and a decision thereon having been handed down on July 24, 1957, it is

Ordered that the determination of the Regents of the University of the State of New York sustaining the decision of the Motion Picture Division of the State Department of Education refusing the petitioner, Kingsley International Pictures Corporation, a license for the exhibi- [fol. 49] tion of the motion picture film "Lady Chatterley's Lover" be and the same hereby is in all respects annulled, and it is further

Ordered that this matter be and the same hereby is remitted to the License Division of the Motion Picture Division of the State Department of Education, and that the said License Division, upon service upon it of a copy of this order, is forthwith directed to issue to the petitioner, Kingsley International Pictures Corporation, a license for the exhibition of the motion picture film "Lady Chatterley's Lover," and the Regents of the University of the State of

New York, the respondents herein, are directed to pay to the petitioner the sum of $50.00 as costs and the disbursements of this proceeding.

Opinion by Coon, J., is referred to herewith.
Bergan, Halpern & Gibson, JJ., concur.
Foster, P. J., concurs in the result.

A true copy

Ent: 8-1-57.

J. Robert Lannan, Clerk.

[fol. 50]

In Supreme Court

Appellate Division—Third Judicial Department

Decision handed down July 24, 1957

In the Matter

of

The Claim of Kingsley International Pictures Corporation, Petitioner,

for an order pursuant to Article 78 of the Civil Practice Act,

v.

The Regents of the University of the State of New York, Respondents.

Decision—July 24, 1957

Determination annulled, with fifty dollars costs, and the matter remitted to the license division with a direction to license the film.

Opinion by Coon, J.
Bergan, Halpern and Gibson, JJ., concur.
Foster, P. J., concurs in the result.

[fol. 51]

IN THE APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK, THIRD JUDICIAL DEPARTMENT

OPINION OF APPELLATE DIVISION

Argued January Term, 1957

Before:

Hon. Sydney F. Foster, Presiding Justice.

Hon. Francis Bergan, Hon. William H. Coon, Hon. Philip Halpern, Hon. James Gibson, Associate Justices.

Proceeding under Article 78 of the Civil Practice Act (transferred to this court by order of the Supreme Court at Special Term in Albany County), to review a determination of the Regents of the University of the State of New York, refusing to issue a license to petitioner for the general exhibition of a motion picture film.

London, Simpson & London, (Ephriam S. London, of Counsel), Attorneys for Petitioner, 150 Broadway, New York City.

Charles A. Brind, Jr., Attorney for Respondents, State Education Building, Albany, New York.

Charles J. Tobin, Jr., Attorney for New York State Catholic Welfare Committee, *amicus curiae*, 100 State Street, Albany, New York.

Charles Ballon, 1501 Broadway, New York City, Nanette Dembitz, 150 Fifth Avenue, New York 10, N. Y., and Jacob M. Usadi, 1501 Broadway, New York City, Attorneys for New York Civil Liberties Union, *amicus curiae*.

[fol. 52] COON, J.:

The motion picture under review is "Lady Chatterley's Lover", an adaptation of the novel of the same name by D. H. Lawrence. The Motion Picture Division of the State Education Department denied a license unless three sequences which were regarded as "immoral" were deleted. On appeal by petitioner the Regents not only upheld the original licensing authorities, but determined that the en-

tire picture was immoral under section 122 of the Education Law as modified by section 122-a (L. 1954, Ch. 620), largely upon the ground that the picture presents "adultery as a desirable, acceptable and proper pattern of behavior." This criterion comes from the language of section 122-a, obviously adopted in an attempt to add definiteness and clarity to the words used in section 122, and with the intended purpose of overcoming the United States Supreme Court decisions which held, in effect, that the terms "immoral" and "tend to corrupt morals," as used in section 122, were too vague to meet constitutional requirements. (*Burstyn v. Wilson*, 343 U. S. 495; *Commercial Pictures Corp. v. Regents*, 346 U. S. 587.)

The Legislature, in enacting section 122-a, has demonstrated a legislative intent to continue prior restraint in New York State, and has attempted to supply the necessary definiteness to the terms "immoral" and "of such a character that its exhibition would tend to corrupt morals."

Section 122-a illustrates the difficulty of defining such words. Subdivision 1 thereof provides: "For the purpose of [fol. 53] section one hundred twenty-two of this chapter, the term 'immoral' and the phrase 'of such a character that its exhibition would tend to corrupt morals' shall denote a motion picture film or part thereof, the dominant purpose or effect of which is erotic or pornographic; or which portrays acts of sexual immorality, perversion, or lewdness, or which expressly or impliedly presents such acts as desirable, acceptable or proper patterns of behavior."

Ordinarily such a word as "immoral", which might have one meaning to one person or group of persons and another meaning to another person or group of persons, cannot be defined with such exactness or precision as would leave no field of individual opinion and discretion open to the viewer. Adding more adjectives or more words which are likewise open to different opinion helps little. In fact, counsel for respondents stated in his brief before the Supreme Court in the *Commercial Pictures* case: "The New York statute, we think, is as clear as it can possibly be made * * *." (Referring to section 122 before the amendment.)

For instance, under section 122-a, the censoring body must determine what "the dominant purpose or effect" of

a picture is, a matter upon which different people or groups of people might disagree. The same is true as to what constitutes "acts of sexual immorality, perversion, or lewdness."

[fol. 54] As we interpret the decisions of the Supreme Court of the United States in the *Burstyn* case, the *Commercial Pictures* case, and Holmby Productions v. Vaughn (350 U. S. 870), a statute which leaves any filed (sic) open to the opinion, discretion or individual point of view of a censor in banning a moving picture violates the Fourteenth Amendment. If any filed (sic) of prior restraint is left open it would seem clear that the Supreme Court decisions forbid a statute as broad as the one under consideration.

Under the decisions it is clear that the standards set up in section 122-a relied upon by the Board of Regents in this case, namely, the presentation of adultery or similar "immoral" acts "as desirable, acceptable or proper patterns of behavior," is not a permissible standard under the United States Constitution for prior restraint.

The most recent decision on this subject by the Court of Appeals of New York State is *Matter of Excelsior Pictures Corp.* v. *Regents*, (3 N. Y. 2d ___, decided July 3, 1957). While the Court of Appeals did not strike down the censorship entirely, the court interpreted the United States Supreme Court decisions as limiting cencorship (sic) to a picture which is "obscene" as that term is narrowly defined in modern judicial decisions. As Judge Desmond stated in his opinion in that case: "Since the Constitution forbids any prior restraint of a motion picture which is not obscene * * * " and, "Since the film is certainly not 'obscene' in the eyes of the law, it cannot, under United [fol. 55] States Supreme Court decisions hereinafter listed and binding upon us, constitutionally be subjected to prior restraint." The opinions in the *Excelsior Pictures* case so thoroughly and completely analyze all of the authorities which are pertinent here it seems unnecessary to discuss them further. We have viewed the picture under consideration here and do not think it can be considered obscene as that term is now judicially defined. Hence, the license denial was unconstitutional.

The determination should be annulled, with fifty dollars costs, and the matter remitted to the license division with a direction to license the film.

[fol. 56]

IN THE COURT OF APPEALS OF NEW YORK

In the Matter of KINGSLEY INTERNATIONAL PICTURES CORPORATION, Respondent,

against

REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, Appellant.

OPINION—Decided May 15, 1958.

Chief Judge Conway. This case presents us again with the question of the constitutionality of our motion picture licensing law. Undoubtedly this is often a question of the greatest delicacy. But as we ponder this particular case and what is involved here, we perceive no necessity for apprehension as to the justice or constitutionality of the Board of Regents' determination to deny a license to this film, "Lady Chatterley's Lover". This denial was based upon sections 122 and 122-a of the Education Law which *require* the denial of a license to motion pictures which are immoral in that they *portray* "acts of sexual immorality * * * as desirable, acceptable or proper patterns of behavior." *It is this portion of the statute only which concerns us here.* The vileness of the matter it seeks to reject is clear. It embraces not only films which are visually suggestive and obscene, nor only those which are sexually suggestive and immoral in theme, but those which combine the two. The statutory rejection is aimed at those films which, not being satisfied with portraying scenes of rank obscenity, go further and recommend sexually immoral acts, thus portrayed in a manner appealing to the prurient interest, as proper conduct for the people of our State.

Having clarified the substance of what this case involves, we proceed to a consideration of the several issues raised.

And we approach them with confidence in our Legislature, concern for our people, and a firm conviction of our solemn constitutional duty which requires us not only to protect the individual from oppressions of government, but the government and the people from abuses by the individual. [fol. 57] This film deals with the relationships of Lady Chatterley with her husband, Sir Clifford Chatterley, and her lover, Mellors. Sir Clifford returned to his wife from the wars as a cripple doomed to a life in a wheelchair. His war injury rendered him impotent to father offspring. By the standards of the community in which he lived, he was a man of affluence, owning a mine and extensive lands. His status was comparable to that of a feudal lord, and much like a feudal lord he was gravely concerned over the fact that he neither had, nor would have, an heir. This led him to propose to his wife, Lady Chatterley, that she have sexual relations with another man of her own choosing so that she might bear an heir for Sir Clifford. Lady Chatterley appeared to reject this idea, inquiring of her husband whether he still loved her, and whether it would be wise to do such a thing since the possibility existed that she might fall in love with the man to whom she would give her body. Sir Clifford explained that his desire for her to have a child was the highest possible expression of his love, and he pointed out that another love could not be born of the purely physical relationship which he anticipated she would have with such a man. No more was said, and Lady Chatterley left her husband's bedroom in which they had been talking.

Subsequently, Lady Chatterley's sister suggested that she take a vacation from the arduous task of caring for her crippled husband. The city of Venice was suggested, and Sir Clifford heartily indorsed this idea, thinking that such a trip would provide his wife with the ideal circumstances for choosing a lover and committing adultery with him.

Before going to Venice, Lady Chatterley made the acquaintance of Mellors, Sir Clifford's gamekeeper. Mellors was a married man, but was living apart from his wife. It was not long before Lady Chatterley and Mellors indulged in adultery. Scenes of their passion were portrayed. Their *affaire*, climaxed by the pregnancy of Lady Chatterley, was unfolded through a series of clandestine bedroom

scenes during which the two were shown lying in bed in a state of apparent undress before, and again after, acts of adultery; during which Mellors assisted Lady Chatterley in her preparations for the sexual act by unbuttoning her blouse and unzipping her dress; during which Mellors expressed his passion by caressing her buttocks, after reaching with his hand under her dress, noting that she had obligingly come to him clad only in a dress, without undergarments; during which numerous other words, gestures and motions were employed to provide the atmosphere prefatory and subsequent to acts of adultery; and during which, at Lady Chatterley's instigation, Mellors removed from the wall above the mantle piece in his living room a large framed picture of his wife and destroyed both frame and picture. [fol. 58] The scenes were set, interrupted only by brief canvasses of darkness, upon which the imagination was permitted to complete the picture of illicit sexual love. Out of these intimacies was born a "love" between Lady Chatterley and her lover Mellors which each regarded as binding them in a true marriage, although not a marriage solemnized by church or state, and although their respective spouses were living.

Events followed quickly on the heels of Lady Chatterley's pregnancy—her trip to Venice, Mellors' dimissal by Sir Clifford because of scandalous "rumors" regarding the two, and her return to the manor. When she returned, Mellors was packing his things in preparation for his departure from the estate. She went first to Mellors to profess her love and to tell him that she would forsake her husband, her wealth and her position to live with him. She then went to her husband to admit the truth of the "rumor" and to tell him of her decision to live with Mellors. Sir Clifford refused to agree to a divorce and insisted that he be given the child when it should be born. Lady Chatterley rejected that and returned to Mellors. The curtain falls as Lady Chatterley and her lover leave his abode for what apparently was regarded by their neighbors who witnessed it from their porches and doorways as a life of illicit intimacy. We make brief mention also of another scene in which Mellors' wife apparently indulges in an act of intercourse with another man beside a body of water.

The dominant theme of the film may be summed up in a few words—exaltation of illicit sexual love in derogation of the restraints of marriage. Their relationship was presented as a true marriage. Their complete surrender to the baser instincts was presented as a triumph over the social mores. Their decision to live in adultery was quietly heralded as a conquest of love over the "form" of marriage. And this entire theme was woven about scenes which unmistakably suggested and showed acts of sexual immorality.

That such is the theme of this motion picture is not open to doubt, particularly in light of respondent's own statement in its brief that the principal theme is that a true marriage exists where there is love, "not when there is merely a formal relationship sanctioned by law." And indeed, in its petition to the Board of Regents, respondent stated that "[h]er [Lady Chatterley's] relationship with Mellors, although not sanctioned by law, is portrayed as a true marriage." Thus, this film unquestionably presents adultery as a proper pattern of behavior. And it does so employing several scenes of obscenity.

However, respondent suggests that the film is nevertheless not immoral according to the mores and moral standards of the community. We think it is beyond cavil that the moral standards and mores of the people of the State [fol. 59] of New York (indeed, of our nation) brand adultery as immoral and illegal. The relationship between Lady Chatterley and Mellors was precisely that—adultery. To urge that such conduct is not immoral constitutes a confession of values so condemnable as not to warrant further comment. The determination by the Board of Regents, a constitutional body, that this picture is utterly immoral in its theme, and that it presented adultery as proper behavior, was entirely correct as measured by the standards of our community. But beyond that, the Legislature specifically designated such a motion picture as immoral, and the determination by the Regents was mandated by statute. Indeed, adultery has been decreed to be immoral since Moses received the Commandments on Mount Sinai. Any suggestion that this film merely demonstrates the necessity for love in marriage insults a concept of the profoundest nobility, and fails to recognize the clear and familiar distinction between

licit and illicit love. To urge that this motion picture merely points up the necessity for love in marriage ignores the facts and the story—the whole context.

It is next urged that this statute is unconstitutionally vague and indefinite. The United States Supreme Court has established the necessary principle that motion picture licensing may be conducted only pursuant to a statute which is so clear in its terms that the licensor is furnished with a definite standard which he may apply (*Joseph Burstyn, Inc.*, v. *Wilson*, 343 U. S. 495, 504-505; see, also, *Superior Films* v. *Department of Educ. of Ohio* and *Commercial Pictures Corp.* v. *Board of Regents*, 346 U. S. 587). The purpose underlying this principle is to divest the licensor of unlimited restraining power based upon his own judgment of what shall or shall not be licensed—to avoid what may be denominated as discretionary censorship. The standard under consideration here is as explicit and restrictive in its terms as words permit. Our Legislature through section 122-a *requires* the denial of a license to any motion picture which *portrays* acts of sexual immorality (here adultery) as proper behavior. No one will deny that the Regents of New York State, just as the members of this court, know what an act of sexual immorality is, and that adultery is such an act. This standard leaves no area of judgment or speculation open to the Regents in which they might arrive at personal judgments as to what constitutes immorality. Their sole function under the statute is the fact-finding function as to whether a particular motion picture portrays acts of sexual immorality as proper behavior. If it does, it is *ipso facto* immoral by statutory mandate. To hold that this standard is vague or indefinite would be to hold that the requirement of definiteness expounded in the *Burstyn* case is impossible to satisfy.

[fol. 60] It should be noted that section 122-a was enacted by our Legislature in 1954 in an attempt to comply with the decision without opinion of the United States Supreme Court in the *Commercial Pictures* case (*supra*). When that case was decided, there was no statutory definition whatever of the word "immoral." We held, in rather general terms, as distinguished from the customary specificity of statutes, that the word "immoral" related to "standards of

sexual morality" (*Matter of Commercial Pictures Corp.* v. *Board of Regents*, 305 N. Y. 336, 346). On appeal to the United States Supreme Court, our decision was reversed without opinion on the authority of the *Burstyn* case (*supra*) which held only, by express limitation in that opinion, that the word "sacrilegious" is too vague and indefinite. The portion of section 122-a which we are considering here, for the first time, defines the word "immoral" much more explicitly than this court construed it in *Commercial Pictures*. Thus, while we reach our conclusion that this standard is definite independently of *Commercial Pictures*, it may be pointed out that our decision there also leads to this result. Futhermore, the reversal without opinion by the Supreme Court in that case cannot be deemed to be dispositive of the new, different, and more explicit language employed in section 122-a *as it applies here*.

Respondent next argues that expression of *opinion* may not be suppressed in the absence of a showing of clear and present danger of substantive evil to the community. It should first be emphasized that the scope of section 122-a is not mere expression of opinion in the form, for example, of a filmed lecture whose subject matter is the espousal of adultery. We reiterate that this case involves the espousal of sexually immoral acts (here adultery) *plus* actual scenes of a suggestive and obscene nature. The question, then, is whether such a motion picture must be *shown* to present a clear and present danger of substantive evil to the community.

Respondent's argument fails to recognize the evil and danger to society which *inheres* in expressions which debase fundamental sexual morality by portraying its converse to the people as alluring and desirable. Such expression has been universally and traditionally condemned by our national society—its inherent evil dependent not at all on the times. It is the very nature and function of such expression to corrupt the public morals. The United States Supreme Court has said that the prevention and punishment of such expression has "never been thought to raise any Constitutional problem", and that "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be

derived from them is *clearly outweighed by the social interest in order and morality.*" (*Chaplinsky* v. *New Hamp-*
[fol. 61] *shire*, 315 U. S. 568, 571-572; see, also, *Beauharnais* v. *Illinois*, 343 U. S. 250, 256, 257; emphasis added.) Thus, in *Roth* v. *United States* (354 U. S. 476), it was held that "obscenity is not protected speech" and that, therefore, there is no need to consider whether "obscene material will perceptibly create a clear and present danger of anti-social conduct" (p. 486). It was noted that obscenity has always been rejected as utterly without redeeming social importance (p. 484). But obscenity is only one word which, among others, signifies "that form of immorality which has relation to sexual impurity" (*Swearingen* v. *United States*, 161 U. S. 446, 451). All these words—indecent, immoral, obscene, lewd, lascivious, etc.—refer to the same substantive evil, viz., sexual impurity and immorality. (See *Swearingen* v. *United States, supra; Matter of Excelsior Pictures Corp.* v. *Regents*, 3 N Y 2d 237, 243; *People* v. *Winters*, 294 N. Y. 545, 550, revd. on other grounds, 333 U. S. 507; *People* v. *Muller*, 96 N. Y. 408.) Their definitions in legal dictionaries reveal they are used interchangeably. They have the same meaning as in common-law prosecutions for obscene libel (*Swearingen* v. *United States, supra*, p. 451; *Matter of Dampier*, 46 Idaho 195; *State* v. *Scope*, 46 Del. 519), which embraced any writings, pictures or the like "of an immoral or an illegal tendency" (4 Blackstone's Comm., p. 150), and "such indecent or immoral publications as tend to destroy the love of purity, morality and virtue, and corrupt the public morals." (Chase, Blackstone's Comm., p. 916, n. 3; see *Rex* v. *Curl*, 2 Str. 788, 93 Eng. Rep. 849). At common law every public show and exhibition which was contrary to good morals was indictable (1 Bishop on Criminal Law, § 504). And so, "freedom of speech * * * does not permit the publication of * * * indecent articles, or other publications injurious to public morals * * *." (*Robertson* v. *Baldwin*, 165 U. S. 275, 281.)

Our conclusion, therefore, is the same as that of the United States Supreme Court in the *Roth* case (*supra*). It is unnecessary to consider whether a motion picture which alluringly portrays sexually immoral acts as proper behavior does, in fact, present a clear and present danger

of substantive evil to the community, if indeed such could reasonably be doubted. There is no difference in substance between motion pictures which are corruptive of the public morals, and sexually suggestive, because of a prodominance of suggestive scenes, and those which achieve precisely the same effect by presenting only several such scenes in a clearly approbatory manner throughout the course of the film. *The law is concerned with effect, not merely with but one means of producing it. We do not believe that a film which is rank pornography is objectionable simply because it excites a human appetite. Rather, the objection lies in* [fol. 62] *the corrosive effect upon the public sense of sexual morality.* The principle which has always prompted the rejection of obscenity is the "social interest in order and morality." (*Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571-572, *supra; Beauharnais* v. *Illinois*, 343 U. S. 250, 256, 257, *supra*).

Essentially, then, the question amounts to this: What can society do about protecting itself from motion pictures which are corruptive of the public morals? We hold that it may refuse to license a motion picture which alluringly portrays adultery as proper behavior. We so hold with full confidence that our Founding Fathers never intended that our Federal Constitution be the altar upon which this State, and this nation, must sacrifice themselves to the ravages of moral corruption. Our Constitution is a document for government, not a tool for anarchy or a license for corruption.

Our holding that a license may constitutionally be denied under the circumstances presented here is well supported in principle by our prior decisions (see *Matter of Excelsior Pictures Corp.* v. *Regents, supra; Matter of Commercial Pictures Corp.* v. *Board of Regents, supra*). We noted in *Excelsior* that sexual immorality is the only legal basis for censorship, keeping in mind that the licensing statute must be very clear. While we noted in *Excelsior* (*supra*, p. 240) that "[w]e will not * * * quibble or quarrel as to concepts of decorum or delicacy or manners", it would seem unnecessary to stress that adultery is not a mere matter of etiquette. Moreover, we view the several decisions of the Supreme Court as indicating the validity of motion

picture licensing directed against sexual immorality *provided* the licensing statute clearly delineates the standard which the licensors are to apply. (See *Commercial Pictures Corp.* v. *Board of Regents, supra; Superior Films* v. *Department of Educ. of Ohio, supra; Joseph Burstyn, Inc.*, v. *Wilson, supra.*) We would be content to rest our decision upon this precedent were it not that the dearth of authoritative opinions leaves the law of motion picture licensing in a state of some uncertainty. Hence, we proceed to further discussion.

Strictly from a pragmatic standpoint, public morality is essential to a civilized society. "History bears witness to the fate of peoples who have been indifferent to the vice of indiscriminate sexual immorality—a most serious threat to the family, the home and the State." (*Matter of Commercial Pictures Corp.* v. *Board of Regents*, 305 N. Y. 336, 342, *supra.*) "The destruction of morality renders the power of the government invalid, for government is no more than public order. It weakens the bands by which society is kept together." (*Commonwealth* v. *Sharpless*, 2 Serg. & Rawl. 91, 103 [Pa., 1815].) Thus, it has always been true that the preservation of public morality is a proper subject for the exercise of the police power. And the Constitutional right [fol. 63] freely to express one's thoughts has never been thought to divest society of its right and duty to preserve fundamental public sexual morality. (*Chaplinsky* v. *New Hampshire, supra*, pp. 571-572.) Thus, sexually impure utterances tending to corrupt the public morals have always been criminally punishable. Very recently, the United States Supreme Court sustained the injunctive process as a perfectly constitutional remedy whereby a State may protect its people from the evil effects of obscene books. *Kingsley Books* v. *Brown*, 354 U. S. 436.) The *Kingsley* case has put to rest the claim that no prior restraint is constitutionally permissible. That court said: "The phrase 'prior restraint' is not a self-wielding sword. Nor can it serve as a talismanic test." (P. 441.) Stress was laid on the fact that upon the courts falls the duty of close analysis and a pragmatic assessment of the operation of the statute under particular circumstances. We apply these thoughts also to the remedy of motion picture licensing.

We do not regard the word "censorship" as a self-wielding sword and we reject it as a talismanic test. Whatever may be the constitutional inhibition against the licensing of books, which were a communicative medium familiar to our forefathers, we cannot conclude that motion pictures must be regulated in precisely the same fashion. It has been observed that "[t]he various forms of modern so-called 'mass communications' raise issues that were not implied in the means of communication known or contemplated by Franklin and Jefferson and Madison. * * * Movies have created problems not presented by the circulation of books, pamphlets, or newspapers * * *." (*Kovacs* v. *Cooper*, 336 U. S. 77, 96.) And thus, the Supreme Court declared six years ago, when it first held motion pictures to be within the general protection of the First and Fourteenth Amendments, that:

"To hold that liberty of expression by means of motion pictures is guaranteed by the First and Fourteenth Amendments, however, is not the end of our problem. It does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places. * * * *Nor does it follow that motion pictures are necessarily subject to the precise rules governing any other particular method of expression. Each method tends to present its own peculiar problems.*" (*Joseph Burstyn, Inc.*, v. *Wilson, supra*, pp. 502-503; emphasis added.)

A contention that motion pictures must be subject to only the same type of regulation as books is "sterile argumentation [which] treats society as though it consisted of bloodless categories" (*Kovacs* v. *Cooper, supra*, p. 96). The greater capacity for evil which inheres in motion pictures has been recognized by the highest Federal tribunal as [fol. 64] "relevant in determining the permissible scope of community control" (*Joseph Burstyn, Inc.*, v. *Wilson, supra*, p. 502). We heed the warning of Justice Holmes that "'[t]o rest upon a formula is a slumber that, prolonged, means death'", and we obey the admonition of Justice Frankfurter, as he pondered this thought, against "mechanical jurisprudence through the use of oversimplified formulas." (*Kovacs* v. *Cooper, supra*, p. 96.) "The tyranny of labels * * * must not lead us to leap to a conclusion that

a word which in one set of facts may stand for oppression or enormity is of like effect in every other." (*Palko* v. *Connecticut*, 302 U. S. 319, 323.) To deny the remedy of licensing as against motion pictures under circumstances such as those disclosed here would be to ignore the spirit and purpose of our Federal Constitution which has always been deemed to permit society to employ remedies which are adequate to protect itself from corruption of public sexual morality. Law, *particularly* constitutional law, is the means whereby society is preserved and held intact. Catch phrases such as "no movie licensing" do nothing to subserve that end. We are molding constitutional *justice*, and have no interest in perpetuating as a motto a concept which was valid *as intended and as applied*, in past history, but not as some seek to extend it today in total disregard of the progress of civilization and the consequences of change, both good and evil. The constitutionality of this statute must be assessed pragmatically in terms of its necessity to society in exercising its vital and recognized right to preserve the public morality.

In considering the question of motion picture licensing, this court has pointed out that "[n]o other method will afford reasonably adequate protection to the public." (*Matter of Commercial Pictures Corp.* v. *Board of Regents*, *supra*, pp. 343, 351.) We are not concerned here with licensing books, pamphlets, newspapers, etc., the traditional media of expression. Moving pictures are our only concern and, what is more to the point, only those motion pictures which alluringly present acts of sexual immorality as proper behavior. This is not a case of a book on a shelf or in a home—it is a case of *mass* dissemination of approved illicit sex by the spoken word and a visual art. It is a case not of one showing but hundreds of showings. It is a case not of an audience of one, but audiences of hundreds—in some cases thousands—at *each* showing. It is a case not merely of a theme of words, but a theme woven about scenes clearly portraying and suggesting acts of adultery. Bearing in mind the broad scope of motion picture presentation, how may society effectively discharge its responsibility to protect itself from morally corruptive films. After all, we are dealing only with a question of remedy—there is no ques-

tion as to the evil which is the subject of the remedy. Not [fol. 65] even the injunctive process, already recognized as constitutionally permissible against obscene *books*, is adequate unless the theory is to be that the public morality may be corrupted from the first showing of the film until it is detected and finally enjoined. We can take little consolation from whatever brevity there may be in such a period of time, notwithstanding the possibility of injunctions *pendente lite*, when one considers the saturation techniques employed by the motion picture industry which presents numerous showings at one and the same time, with several showings per day in each theatre. And beyond that, we take note of the possible multiplication of this mass presentation by means of television. There can be little doubt that the only *effective* remedy which society possesses lies in a system of motion picture licensing which will operate adversely only to motion pictures which are corruptive of public morality. The substantive evil of the expression considered in light of the medium in issue make this a necessary and constitutional policy. To hold otherwise would be a "decision of desperation" (*Poulos* v. *New Hampshire*, 345 U. S. 395, 408)—a confession that our State is helpless to prevent the corruption of public morals, a duty which it has assumed from time immemorial. We do not believe this is a confession which this court is required to make.

Analyzing this statute still further, we note that full judicial review under article 78 of the Civil Practice Act is available as a matter of right from any and every adverse determination by the Board of Regents (Education Law, § 124). Fully appreciative of the preferred position of the constitutional guarantee of free expression, the courts of this State will always be alert to excesses and most quick to correct them, as indeed we were recently in the *Excelsior* case (*supra*). We note further that " * * * this sovereign State put the licensing power in one of its most powerful and most respected governmental bodies, the Board of Regents, a 'citizens' board' which is at the head of the State's educational system. Censorship in New York is, therefore, carried on at the highest levels of responsible State Government." (*Matter of Commercial Pictures Corp.*

v. *Board of Regents*, 305 N. Y. 336, 350, *supra*.) Thus safeguarded, the operation of this statute is simply to protect the citizens of our State from motion pictures which alluringly portray acts of sexual immorality (here adultery) and recommend them as a proper way of life. No other remedy will accomplish this result. Considering all of the foregoing, our judgment is that this statute insofar as it is involved here survives the test of close analysis and pragmatic assessment laid down by the highest Federal tribunal in the *Kingsley* case (*supra*).

[fol. 66] It is fundamental that each sovereign State has, under the Federal Constitution, the primary responsibility for the preservation of the basic morality of its people. Of course, it is equally fundamental that the State must discharge that responsibility without undue infringement upon individual liberty. But the distinction between liberty and license must be made. We fail to perceive what right is infringed here. The Constitution of the United States, "that great ordinance of government and *orderly liberty*", is invoked to protect the mass dissemination of approved sexual immorality by adultery in motion pictures from the only effective remedy which society possesses. (See *Schaefer* v. *United States*, 251 U. S. 466, 477; italics supplied.) In the name of liberty we are requested to confer license to corrupt. "It would be a travesty on the constitutional privilege he invokes to assign him its protection." (*Gilbert* v. *Minnesota*, 254 U. S. 325, 333.)

Only the State, close to the problems of its people, can fully appreciate them. We are disturbed by the increasing marks of moral laxity. Sex crimes occur daily. Advertising appeals more and more to the sexual appetite. Sexual immorality and obscenity appear in books, pamphlets, voice recordings, motion pictures, photographs, prints, and in every other form which the imagination of those bent upon immorality and filth can devise. Sadly enough, we could go on. But this much is sufficient to demonstrate that our public morality, possibly more than ever before, needs every protection which government can give. We are unable to look upon moral disintegration as a mere change in custom. We reiterate that "[t]he destruction of morality renders the power of the government invalid, for govern-

ment is no more than public order * * *." (*Commonwealth* v. *Sharpless*, *supra*, p. 103.)

There would seem to be little difficulty for most to accept sheer obscenity as a proper basis for motion picture censorship. However, to lay hold of obscenity as the *only* proper basis for motion picture censorship is to ignore substance in favor of form. As we noted earlier in discussing the question of clear and present danger, obscenity has been universally and traditionally rejected *because it is destructive of the public morality*. In view of this, it is curious indeed to say in one breath, as some do, that obscene motion pictures may be censored, and then in another breath that motion pictures which alluringly portray adultery as proper and desirable may not be censored. As stated above, "The law is concerned with effect, not merely with but one means of producing it." It must be firmly borne in mind that to give obscenity, as defined, the stature of the only constitutional limitation is to extend an invitation to corrupt the public morals by methods of presentation which craft will insure do not fall squarely within the definition of that [fol. 67] term. Precedent, just as sound principle, will not support a statement that motion pictures must be "out and out" obscene before they may be censored. *Roth* v. *United States* (354 U. S. 476, *supra*) did not involve motion pictures, much less their licensing. It merely held that obscenity is not protected speech and in the case of an obscene book it is not necessary to establish clear and present danger of substantive evil to the community. In sum, the Supreme Court has never outlined the substantive limits of motion picture censorship. To claim otherwise is to supplant reality with hope, and replace law with theory.

We refuse to be led away by alarmist cries that, if a license is refused under the circumstances disclosed by this record, the door is opened to unnecessary and unwarranted extensions of that remedy. The very test of necessity which we have utilized precludes that possibility. And we have already declared it to be our most solemn constitutional duty to "'eschew the extremes and shun the extremists'". (*Matter of Excelsior Pictures Corp.* v. *Regents*, *supra*, p. 246.) There is nothing extreme about refusing a license to films which alluringly portray acts of sexual immorality

by adultery as proper behavior. To withhold our approval from this amount of regulation would itself be an extreme. To those who fear possible unnecessary extensions of this remedy, we reply that this court is competent to define the permissible scope of motion picture licensing and to safeguard constitutional liberties.

It is not aside from the issue to ponder, for a moment, the fact that this State and this nation have always been dedicated to the observance of fundamental morality. Indeed, when we declared our independence from the yoke of tyranny, we conceived that the unalienable liberties of men, one of which is free expression, are endowed "by their Creator". And in the same document, as they embarked upon the cause of freedom, its drawers expressed "a firm reliance on the protection of Divine Providence". After the cause was won, the Congress observed that "morality" is "necessary to good government". (Ordinance of 1787, art. III; McKinney's Cons. Laws of N. Y., Book 2, Constitution, pt. 2, p. 527.) Lest anyone claim that almost two centuries have worked a contrary view in this nation, let him reflect upon the recent words of the United States Supreme Court: "We are a religious people whose institutions presuppose a Supreme Being." (*Zorach* v. *Clauson*, 343 U. S. 306, 313.) And let him consider also the fact that the Pledge of Allegiance was recently altered so that it declares this nation to be one "under God." We can think of no greater national hypocrisy, or perversion of our Constitution, than to say that that document renders society impotent to adopt the only adequate remedy against motion pictures which are corruptive of the public morality. Indeed, [fol. 68] it is necessary for our survival as a nation in an age of open conflict with atheistic materialism.

This case presents not only a question of law. It presents a matter of governmental conscience for which we are all responsible. We perceive no requirement in our Constitution that prohibits us from concluding as we have. If our people must be exposed to mass sexual immorality, if the very fabric of our society is to be laid bare to such corrosive influences, it must be at the command of our people themselves. Their command, however, has been to the contrary by virtue of this enactment. We think their decision is supported by their Constitution.

No other issues are raised which require discussion.

The order of the Appellate Division should be reversed, with costs in this court and in the Appellate Division, and the determination of the Board of Regents confirmed.

Desmond, J. (concurring). Appellants, the State Board of Regents, have banned the motion picture "Lady Chatterley's Lover" as being "immoral" within the special definition of that word in subdivision 1 of section 122-a of the Education Law, that is, as being a film "which portrays acts of sexual immorality * * * or lewdness" and which "presents such acts as desirable, acceptable or proper patterns of behavior". Since the theme and content of this film fairly deserve that characterization, the Regents acted within their express statutory powers in refusing to license it for exhibition. That, however, does not decide this lawsuit.

The question for decision is the one that has troubled our court and other State courts as well as the United States Supreme Court in a long series of litigations (from *Mutual Film Co.* v. *Ohio Ind. Comm.*, 236 U. S. 230 [1915], to *Times Film Corp.* v. *City of Chicago*, 355 U. S. 35 [1957]) involving State or municipal censorship of movies. Our problem is whether this statute insofar as it imposes prior restraint on the showing of this film in New York State offends against the free speech guarantee of the First and Fourteenth Amendments to the United States Constitution. In arriving at our answer we must perform a double duty. We must abide by the decisions of the supreme Federal judicial tribunal so far as pertinent and at the same time we must be reluctant to strike down a solemn legislative enactment on the ground of unconstitutionality, for that we may do "only as a last resort" (*Matter of Ahern* v. *South Buffalo Ry. Co.*, 303 N. Y. 545, 555). I am voting to reverse here and to uphold this denial of a license because this New York statutory definition of "immoral" carefully and quite recently devised by chapter 620 of the Laws of 1954 to meet constitutional objections (see *Matter of Commercial Pictures Corp.* v. *Board of Regents*, 305 N. Y. 336, revd. 346 U. S. 587) to the use of such wide or vague terms as [fol. 69] "immoral" and "tend to corrupt morals", is not patently unconstitutional. Furthermore, neither it nor any

other State statute closely resembling it has been held invalid by the Supreme Court.

Of course if we had here (as in *Brown* v. *Kingsley Books*, 1 N Y 2d 177, affd. 354 U. S. 436) a case of hard core out-and-out pornography, our task would be simple enough. In *Joseph Burstyn, Inc.*, v. *Wilson* (343 U. S. 495, 502) the Supreme Court rejected the absolutist idea that "The Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places". And, more specifically, in *Roth* v. *United States* (354 U. S. 476 —a criminal prosecution) the court flatly announced that "obscenity is not within the area of constitutionally protected speech" (p. 485, and see our similar holding in *Matter of Excelsior Pictures Corp.* v. *Regents*, 3 N Y 2d 237). "Obscene material", the Supreme Court told us in *Roth* (*supra*, p. 487), is "material which deals with sex in a manner appealing to prurient interest". But "prurient interest" is subjective and various. The movie we are here dealing with, while it has for its main or only theme illicit sexual congress, is a film version of a novel of great fame by an eminent author and, says the Supreme Court, "The portrayal of sex, *e.g.*, in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional freedom of speech and press" (*Roth* opinion, p. 487). The old *Hicklin* (*Regina* v. *Hicklin*, L. R. 3 Q. B. 360) test which examined into the publication's effect on "particularly susceptible persons" has been finally rejected (*Roth* opinion, p. 489). Now given the Supreme Court's approval is this test for obscenity: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest" (*Roth* opinion, p. 489). That criterion is roughly the same as the one presented in *Butler* v. *Michigan* (352 U. S. 380, 382), that is, the influence of the product on a normal adult. I confess my own inability to determine whether or not an average person, applying to "Lady Chatterley's Lover" the undiscoverable standards of a hypothetical community would consider that the dominant theme of the whole film appealed principally to prurient interest or to artistic sensibilities or to a mature and adult interest in one of the lively arts. But one sure result of the *Roth*

decision was to disappoint both the extreme liberals who had hoped to spread the First Amendment's blanket over all speech whether obscene or not, and the extremists at the other end who despite the pluralist character of our society would make of the law a policeman enforcing their own ideas of morality and propriety.

Helpful as are the *Roth* decision's explanations of the constitutional limits of speech and press freedom (and see, [fol. 70] also, *Alberts* v. *California*, 354 U. S. 476, and *Kingsley Books* v. *Brown*, 354 U. S. 436, decided by the court on the same day), there are still large areas of uncertainty. The publications which were the subject matter of *Roth*, *Alberts* and *Kingsley* were actually pornographic and salacious, utterly lacking in "social importance" or value (*Roth* opinion, p. 484). So the Supreme Court was really passing only on the general constitutionality of State action against obscenity without finding it necessary to set down precise criteria for deciding whether a particular book or picture is obscene. It still remains true that the highest Federal court has never yet upheld any single instance of administrative censorship of a motion picture.

In the *Excelsior Pictures* case (3 N Y 2d 237, *supra*) our own court overruled the Regents' restraint of a nudist movie since the majority of this court considered the picture innocent and innocuous, merely unconventional in that it pictured activities of unclothed family groups in a secluded camp. In January of this year (*Sunshine Book* v. *Summerfield*, 355 U. S. 372) the Supreme Court, with no explanation beyond a reference to the *Roth* case (*supra*), held invalid the exclusion from the mails of a nudist magazine (also a magazine dealing with homosexuality—*One, Inc.*, v. *Olesen*, 355 U. S. 371). Presumably, the court having looked at those books simply held them not to be obscene. A few months earlier the court in *Times Film Corp.* v. *City of Chicago* (355 U. S. 35, *supra*) reversed a ban by the Chicago authorities on the French moving picture "Game of Love". That picture was from all accounts sexy in the extreme (see descriptions in the lower court opinions at 139 F. Supp. 837 and 244 F. 2d 432) and it had been denied exhibition under an ordinance condemning movies "immoral or obscene".

All this recent history suggests that the Supreme Court will insist that censorship for obscenity be "closely confined" (*Kingsley Books* v. *Brown*, 354 U. S. 436, 441, *supra*) especially as applied to works of any literary or dramatic merit or expressing "ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion" (*Roth* opinion, p. 484, *supra*). Similarly, our own State Constitution says that: "every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right". But we are still left with our own stern duty of upholding, if we can on reason and authority, our own State's statute.

It is of no great importance that the Regents in denying a license here did not use the word "obscene" nor is it necessarily determinative that this film is not obscene in the dictionary sense of being lewd, disgusting or loathsome or dealing directly and foully with the excretory or sexual [fol. 71] organs or functions. Our question is whether New York State may constitutionally refuse exhibition to a film because its subject matter is adultery presented as being right and desirable for certain people under certain circumstances. I confess doubt as to the validity of such a statute but I do not know how that doubt can be resolved unless we reverse here and let the Supreme Court have the final say. Unquestionably, this motion picture would be considered obscene by many not illiberal moralists as objectively evidencing an intent by the author to arouse the viewer by emphasizing the sexually exciting elements of the story, a concept of obscenity not unlike the classic definition in *United States* v. *One Book Called "Ulysses"* (5 F. Supp. 182, 184; see my article, Legal Problems Involved in Censoring the Media of Mass Communication, in 40 Marquette L. Rev. 38, 55-56).

It still remains that the States have large remaining powers to apply reasonably related remedies to domestic evils (see *Butler* v. *Michigan*, 352 U. S. 380, 383, *supra*). The problem is not one of precise definition of "prior restraint" or "obscenity" or other word or phrase. A leading authority on legislation says that "the question should be not one of standards but rather whether censorship

should be permitted in the particular case regardless of the wording" (Control of Objectionable Publications—A Drafting Problem, 44 A. B. A. J. 175). To be examined is "the operation and effect of the statute in substance" (*Near* v. *Minnesota*, 283 U. S. 697, 713; *Kingsley Books* v. *Brown*, 354 U. S. 436, 441, *supra*). The "operation and effect" of subdivision 1 of section 122-a of our Education Law in this instance has been to keep from the screen a motion picture the theme of which is adultery, alluringly and approvingly depicted. Until the highest national tribunal says otherwise, we should let our statute so operate.

The order should be reversed, with costs in this court and in the Appellate Division, and the determination of the Board of Regents confirmed.

Dye, J. (dissenting). When sections 122 and 122-a of the Education Law are read in the light of recent decisions dealing with administrative censorship of motion picture film, it seems clear that the learned Appellate Division, Third Department, quite properly annulled the determination of the Board of Regents and directed that a license issue for the showing of the motion picture entitled "Lady Chatterley's Lover".

As the record indicates, the Regents sitting as a Board of Review of its Division of Motion Pictures (an administrative agency empowered to censor motion picture film in advance of public showing, Education Law, §§ 122-132) affirmed a denial of the petitioner's application for a license to exhibit the film in question—*not conditionally*, unless [fol. 72] certain designated sequences were deleted, as directed by the acting director of the Motion Picture Division, but *absolutely* and *finally* in language reflecting the vague generality of the statute, viz., that "the said film is 'immoral' within the meaning of the provisions of Sections 122 and 122-a of the Education Law" (Journal of Regents meeting, Sept. 28, 1956).

The correctness of that ruling, which a bare majority of this court is about to approve, depends in the final analysis solely on whether the enforcement of sections 122 and 122-a (subd. 1) satisfies constitutional due process.

When the Regents relied on the term "immoral" and the phrase "tend to corrupt morals", as used in section 122, as

authority for banning the motion picture film *La Ronde*, the Supreme Court reversed, without opinion (*Matter of Commercial Pictures Corp.* v. *Board of Regents*, 305 N. Y. 336, revd. 346 U. S. 587), at the same time it decided *Superior Films* v. *Department of Educ. of Ohio* (346 U. S. 587), both on authority of *Joseph Burstyn, Inc.*, v. *Wilson* (343 U. S. 495) which had sustained a prior attack on section 122 as being too vague and indefinite to satisfy constitutional safeguards by providing essential criteria and standards for the guidance of administrative discretion. To meet the consequential effect of that adverse ruling section 122-a of the Education Law (L. 1954, ch. 620) was enacted in an effort to more precisely define the term "immoral" and the phrase "tend to corrupt morals" as used in section 122 for the purpose of censorship as denoting "a motion picture film or part thereof, the dominant purpose or effect of which is *erotic* or *pornographic* or which portrays *acts of sexual immorality, perversion*, or *lewdness*, or which expressly or impliedly presents such acts as desirable, acceptable or proper patterns of behavior" (Education Law, § 122-a, subd. 1; emphasis supplied).

However well intentioned, the language as used still falls short of providing fundamental standards deemed essential for the guidance of administrative discretion. The added words are no more meaningful than the term "sacrilegious", "immoral", "tend to incite to crime", "prejudicial to the best interests", "harmful and indecent", all found too general and unprecise to meet constitutional standards (*Joseph Burstyn, Inc.*, v. *Wilson, supra*; *Matter of Commercial Pictures* v. *Board of Regents, supra*; *Winters* v. *New York*, 333 U. S. 507; *Gelling* v. *Texas*, 343 U. S. 960; *Superior Films* v. *Department of Educ. of Ohio*, 346 U. S. 587, *supra*; *Matter of Excelsior Pictures Corp.* v. *Regents*, 3 N Y 2d 237; *Holmby Prods.* v. *Vaughn*, 350 U. S. 870; *Hallmark Prods.* v. *Carroll*, 384 Pa. 348). The term "immoral" as used in section 122 has not been clarified by the amendment. It is still vague and indefinite. When the censor relies on the term "immoral" as a basis for prior restraint, he neces- [fol. 73] sarily must resort to his own notion of its meaning since the statute itself provides no test or standards to guide him in the exercise of his discretion. As the learned

Justice, writing for the court below, succinctly pointed out: "A statute which leaves any field open to the opinion, discretion or individual point of view of a censor in barring a moving picture violates the Fourteenth Amendment".

No one contends that the film in question is obscene within the narrow legal limits of obscenity as recently defined by the Supreme Court in the application of which that court has said it is vital "that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest" (*Roth* v. *United States*, 354 U. S. 476, 488; *Matter of Excelsior Pictures Corp.* v. *Regents*, 3 N Y 2d 237, *supra*; *Holmby Prods.* v. *Vaughn*, 350 U. S. 870, *supra*). This film is not being banned because of the manner in which the sequences are produced or because of any existing clear and present danger—elements which must be proven before prior restraint or subsequent punishment may be justified (*Dennis* v. *United States*, 341 U. S. 494; *Marsh* v. *Alabama*, 326 U. S. 561; *Thomas* v. *Collins*, 323 U. S. 516; *Thornhill* v. *Alabama*, 310 U. S. 88; *De Jonge* v. *Oregon*, 299 U. S. 353; *Stromberg* v. *California*, 283 U. S. 359). The Regents have banned a showing of this film in its entirety because, in their opinion, its theme is *contra bonos mores*, and this in the face of the circumstance, that the book, on which it is based, has long been published and circulated freely without benefit of administrative censorship. This they may not do. Since *Burstyn* and *Commercial Pictures* (*supra*), the essential particulars of section 122 have been deemed too vague and too indefinite to satisfy fundamental essentials of statutory validity, and these deficiencies have not been cured or supplied by anything contained in subdivision 1 of section 122-a. As I read it, the statute, as amended, continues to impinge on the constitutional guarantee afforded free speech and communication by the First and Fourteenth Amendments to the Federal Constitution.

A motion picture film should not be singled out as a subject for prior restraint under the beneficent guise of regulating community mores, any more than the prior censorship of press, books, the theatre or other media of communication which, as we know, includes a motion pic-

ture. Censorship under such guise is a type of paternalism that lends itself to the whim and caprice of the administrator. Whenever tested, censorship of motion picture film in advance has been disapproved. All but six States in the Union either do not have any film censorship in advance or have discontinued such practice. It should be noted that discontinuance of administrative censorship of motion [fol. 74] picture film in advance is not likely to create a vacuum for carte blanche exhibition of indecent films, so long as we have on our statute books appropriate penal laws to deal with the suppression of legally offensive motion picture film and the punishment of its exhibitors (cf. Penal Law, §§ 1141, 1141-a; Code Crim. Pro., § 22-a; *Brown* v. *Kingsley Books*, 1 N Y 2d 177, affd. 354 U. S. 436).

For these reasons and for the reasons so well stated by Judge Fuld with which I agree, I vote to affirm the judgment appealed from, with costs.

Fuld, J. (dissenting). In my opinion, an affirmance is compelled not only on the ground that the term "immoral," as defined in the Education Law, lacks that precision of meaning demanded by the Due Process Clause (see, e.g., *Commercial Pictures Corp.* v. *Regents*, 346 U. S. 587, revg. 305 N. Y. 336; *Times Film Corp.* v. *City of Chicago*, 355 U. S. 35, revg. 244 F. 2d 432), but also for the reason that the film, "Lady Chatterley's Lover"—based on "a novel of great fame by an eminent author" (per Desmond, J., concurring, p. 367)—is not of a character which the First Amendment permits a state to exclude from public view. I agree, therefore, with what Judge Dye has said, but I would add these further thoughts on the more basic issue presented.

I cannot accept the premise underlying the opinions written for reversal on behalf of the majority, in other respects conflicting, that there is no meaningful distinction, so far as the doctrine of prior restraint is concerned, between a case involving post-publication prosecution and one involving prior administrative censorship. As I read the cases decided by the Supreme Court of the United States, legislation aimed at preventing the exhibition of moving pictures without advance approval by an administrative body, constituting as it does the clearest sort of

previous restraint, is to be sharply differentiated from a statute providing for prosecution after publication. (Compare *Roth* v. *United States*, 354 U. S. 476 [per Brennan, J.], pp. 494-495 [per Warren, Ch. J., concurring], with *Joseph Burstyn, Inc.*, v. *Wilson*, 343 U. S. 495; *Holmby Prods.* v. *Vaughn*, 350 U. S. 870; *Times Film Corp.* v. *City of Chicago*, 355 U. S. 35, *supra*.)

In reaching the conclusion that a system of prior administrative censorship is unconstitutional, I have in mind that even the limited injunctive process, with provision for prompt trial by the court, was recently regarded by four justices of the Supreme Court as an impermissible prior restraint. (See *Kingsley Books* v. *Brown*, 354 U. S. 436, 445-447.) Indeed, the majority of the court as well, after noting that " 'the protection * * * as to previous restraint is not absolutely unlimited' ", went on, significantly, to say, [fol. 75] "the limitation is the exception; it is to be closely confined so as to preclude what may fairly be deemed licensing or censorship" (354 U. S., at p. 441). The latter is precisely what is here involved and the fact that a social problem is presented, which calls for solution, does not justify resort to unconstitutional means. As Chief Justice Warren wrote, in the course of his concurring opinion in *Roth* v. *United States* (354 U. S. 476, 495, *supra*), "To recognize the existence of a problem, however, does not require that we sustain any and all measures adopted to meet that problem."

Were we dealing with newspapers or books or with a stage play, there could be no question as to the unconstitutionality of the statute under consideration, and I perceive no basis for distinguishing between such forms of expression and a moving picture. The Constitution protects all expression and is limited neither by the thoughts put forth nor by the medium employed. It protects the transmission of ideas and beliefs, whether orthodox or unorthodox, popular or unpopular, and its protection extends alike to words uttered in the street, a public hall or a theatre (with actors live or on a screen) and to words written in newspapers, books or motion picture subtitles. A belief does not lose its character as a belief, an idea does not become less of an idea, because, instead of being expressed

by the airborne voice, the printed word or the still picture, it is put forward by a moving picture with a sound track. The First Amendment does not inquire whether the medium is visual, acoustic, electronic or one yet to be devised, nor does it seek to know the speed of dissemination or the size of the audience. In short, the Amendment's meaning and vitality may not be conditioned upon the mechanism involved, and the differences existing between a book and a moving picture do not support a holding that the freedom of expression assured by the Constitution is inapplicable to the moving picture.

I would, therefore, affirm the Appellate Division's order.

Van Voorhis, J. (dissenting). I agree with the Appellate Division and with my dissenting brethren that section 122-a of the Education Law is unconstitutional, in which event this problem play cannot be suppressed as "immoral". On the other hand, it would have been within the jurisdiction of the Regents (it seems to me) to have eliminated several passages in this picture as "obscene" under section 122. The Motion Picture Division of the Education Department attempted something of that sort in recommending that certain scenes be expurgated, but on the ground that they are "immoral". Although that ground is not available, and it is impossible to write off this entire drama as "mere pornography" (*Roth* v. *United States*, 354 U. S. 476), certain passages might have been eliminated as "obscene" without doing violence to constitutional liberties. In their endeavor to censor morality, both the Motion Picture Divi- [fol. 76] sion and the Regents seem to have overlooked their power to exclude "obscenity", which includes the portrayal on the public screen of sexual intimacies whether they be marital or extramarital. Thus, while concurring with the dissenting Judges to affirm the unconstitutionality of section 122-a, I would remit the matter to the Board of Regents to consider the aspect which I have mentioned before ordering them to issue a license for the exhibition of this picture without any expurgations.

Judges Froessel and Burke concur with Chief Judge Conway; Judge Desmond concurs in result in a separate opinion; Judges Dye and Fuld dissent and vote to affirm.

each in a separate opinion in which the other concurs and in both of which dissenting opinions Judge Van Voorhis concurs in part in a separate dissenting opinion for remission of the matter to the Board of Regents.

Order reversed, etc.

[fol. 77]

COURT OF APPEALS

State of New York, ss.:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 15th day of May in the year of our Lord one thousand nine hundred and fifty-eight, before the Judges of said Court.

Witness, The HON. ALBERT CONWAY, Chief Judge, Presiding. RAYMOND J. CANNON, Clerk.

REMITTITUR May 15, 1958.

(Seal)

[fol. 78]

No. 309.

In the Matter of the Application of

KINGSLEY INTERNATIONAL PICTURES CORPORATION,
Respondent,

For an Order &c.,

vs.

THE REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,
Appellants.

Be it Remembered, That on the 8th day of November in the year of our Lord one thousand nine hundred and fifty-seven, The Regents of the University of the State of

New York, the appellants in this cause, came here unto the Court of Appeals, by Charles A. Brind, Jr., and Louis J. Lefkowitz, Attorney General, their attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And Kingsley International Pictures Corporation, the respondent in said cause, afterwards appeared in said Court of Appeals by London, Simpson & London, its attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

[fol. 79] Whereupon, The said Court of Appeals having heard this cause argued by Mr. Charles A. Brind, Jr., and Mrs. Ruth Kessler Toch, of counsel for the appellants, and by Mr. Ephraim S. London, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is reversed, with costs in this Court and in the Appellate Division, and the determination of the Board of Regents confirmed.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

[fol. 80] Therefore, it is considered that the said order be reversed, with costs &c., as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

s Raymond J. Cannon, Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office, Albany, May 15, 1958.

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

/s/ Raymond J. Cannon, Clerk.

(Seal)

[fol. 81]

At a Special Term of the Supreme Court of the State of New York, held in and for the County of Albany, at the County Court House, Albany, New York, on the 2nd day of July, 1958.

Present: Hon. Isadore Bookstein, Justice.

In the Matter of the Application of

Kingsley International Pictures Corporation,
Petitioner-Respondent,

For an Order pursuant to Article 78 of the
Civil Practice Act,

against

The Regents of the University of the State of New York,
Respondents-Appellants.

Judgment on Remittitur—July 2, 1958

The above named respondents-appellants having appealed to the Court of Appeals of the State of New York from the order of the Appellate Division of this Court, Third Judicial Department, entered in the office of the Clerk of the County of Albany on the 1st day of August, 1957, which said order annulled, unanimously, the determination of the respondents-appellants, the Regents of the University of the State of New York, and further directed the respondents appellants to issue a license for the exhibition of the motion picture film "Lady Chatterley's Lover"; and the

said appeal having been duly argued in the said Court of Appeals, by Charles A. Brind, Jr., Esq., and Mrs. Ruth Kessler Toch, Assistant Attorney General on behalf of respondents-appellants and by Ephraim S. London, Esq., on behalf of petitioner-respondent and after due deliberation the Court of Appeals having ordered and adjudged that the order of the Appellate Division of the Supreme Court appealed from herein be reversed, with costs, and the determination of the Regents of the University of the State of New York be confirmed, and having further ordered that the proceedings herein be remitted to this Court and [fol. 82] to be proceeded upon according to law; and the remittitur from said Court of Appeals having been filed herein;

Now, on motion of Charles A. Brind, Jr., Esq., attorney for the respondents-appellants herein, it is

Ordered, that the order of said Court of Appeals be, and the same hereby is, made the order and judgment of this Court, and that the said order of the Appellate Division of the Supreme Court, Third Department entered in the office of the Clerk of the County of Albany on the 1st day of August, 1957 be, and the same hereby is, annulled with costs.

/s/ Isadore Bookstein, J.S.C.

Enter

(Seal)

[fol. 83]

IN SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of the Application of

KINGSLEY INTERNATIONAL PICTURES CORPORATION,
Petitioner (Appellant),

For an Order pursuant to Article 78 of the
Civil Practice Act,

—against—

THE REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,
Respondents (Appellees).

NOTICE OF APPEAL—Filed July 30, 1958

To the Supreme Court of the United States

I. Notice is hereby given that Kingsley International Pictures Corporation, the Petitioner above named, hereby appeals to the Supreme Court of the United States (1) from the order of the Court of Appeals of the State of New York reversing the order of the Appellate Division of the Supreme Court of the State of New York, Third Department; (the order appealed from in effect denied Petitioner a license for the exhibition of its motion picture "Lady Chatterley's Lover"); and (2) from the final order and judgment of the above Court making the order of the Court of Appeals the order and judgment of the above Court. The order of the Court of Appeals appealed from was made and entered in this proceeding May 15, 1958, and the order and judgment of this Court was made and entered in this proceeding July 2, 1958.

[fol. 84] This appeal is taken pursuant to 28 U.S.C. Section 1257, subdivision 2.

II. The Clerk of the Supreme Court of the State of New York, County of Albany, will please prepare a transcript of the record of this cause and include in said transcript the following:

The Papers on Appeal in this proceeding to the Court of Appeals of the State of New York;

The Remittitur from the Court of Appeals in this cause dated May 15, 1958;

The order of the Supreme Court of the State of New York held in the County of Albany, dated July 2, 1958, making the order of the Court of Appeals the order and judgment of the said Supreme Court of the State of New York.

III. The following questions are presented by this appeal:

1. Whether Sections 122 and 122-a.1 of the Education Law of the State of New York (pursuant to which the Petitioner's film "Lady Chatterley's Lover" was banned in the State of New York as "immoral") are so vague and indefinite that their enforcement violates the due process clause of the Fourteenth Amendment to the Constitution of the United States.

2. Whether Sections 120 to and including 132 of the Education Law of the State of New York, in setting up a system of censorship of motion pictures prior to their publication or exhibition, unlawfully inhibit freedom of expression and communication in violation of the First and Fourteenth Amendments to the Constitution of [fol. 85] the United States.

3. Whether Sections 122 and 122-a.1 of the Education Law of the State of New York contravene the First and Fourteenth Amendments to the Constitution of the United States in authorizing the suppression of opinion. Appellant's film was banned in the State of New York because, as interpreted by the Respondents and the Court of Appeals, it condoned adultery under certain circumstances. The film was, for that reason, found to be "immoral." The majority of the Judges of the Court of Appeals did *not* find the film obscene, and the Justices of the Appellate Division for the Third Department of the State of New York found that the film is not obscene.

4. Whether Appellant was arbitrarily deprived of property rights and of its right of communication without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States by the refusal to permit the exhibition of its motion picture "Lady Chatterley's Lover" in the State of New York; the picture being a faithful and seemly film version of a major novel (written by an eminent and gifted author), published and widely circulated in the State of New York.

Dated, New York, July 25th, 1958

/s/ Ephraim S. London, Attorney for Appellant Kingsley International Pictures Corporation, Office & P. O. Address, 150 Broadway, New York 38, N. Y.

(Seal)

[fol. 86] To: Charles A. Brind, Jr., Esq., Counsel to the Regents of the University of the State of New York, Appellees, State Education Building, Albany, N. Y.

Louis J. Lefkowitz, Esq., Attorney General of the State of New York, State Capitol, Albany, N. Y.

Hon. Donald L. Lynch, Clerk of the Supreme Court of the State of New York, County of Albany, County Court House, Albany, N. Y.

[fol. 87]

SUPREME COURT OF THE UNITED STATES

No. 394, October Term, 1958

KINGSLEY INTERNATIONAL PICTURES CORPORATION, Appellant,

vs.

THE REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK.

ORDER NOTING PROBABLE JURISDICTION—November 24, 1958

Appeal from the Court of Appeals of the State of New York.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary calendar.

November 24, 1958

FILE COPY

Office Supreme Court, U.S.
FILED
SEP 23 1948
JAMES R. BROWNING, Clerk

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 394

IN THE MATTER

of

The Application of KINGSLEY INTERNATIONAL PICTURES CORPORATION,

Appellant,

For an Order Pursuant to Article 78 of the Civil Practice Act

against

THE REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

JURISDICTIONAL STATEMENT.

EPHRAIM LONDON,
Attorney for Appellant,
150 Broadway,
New York 38, N. Y.

Law Printing Corp., 241 Church St., New York 13, N. Y. WO 2-7680 346

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Supreme Court of the United States

OCTOBER.... TERM, 1958.

No. .....

IN THE MATTER

of

The Application of KINGSLEY INTERNATIONAL PICTURES CORPORATION,

Appellant,

For an Order Pursuant to Article 78 of the Civil Practice Act,

against

THE REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

Jurisdictional Statement.

(a) Reports of the Opinions in the Courts Below.

The opinion of the Appellate Division of the State of New York, Third Department, in this case is reported in 4 App. Div. 2d 348, 165 N. Y. S. 2d 681. The opinions delivered in the Court of Appeals of the State of New York in this case are reported in 4 N. Y. 2d 349, 175 N. Y. S. 2d 39, and are set forth in full in the Appendix hereto at pages 20-48.

(b) The Grounds on which Jurisdiction of the Supreme Court of the United States is Invoked.

(i) The proceeding was instituted by the Appellant to review and annul the Regents' order refusing Appellant a license for the exhibition of the film "Lady Chatterley's Lover." Appellant also sought a decree declaring the motion picture licensing law of the State of New York null and void because it contravenes the First and Fourteenth Amendments to the Constitution of the United States.

The proceeding was brought pursuant to Article 78 of the Civil Practice Act of the State of New York. Article 78 provides for and regulates proceedings in the nature of writs of mandamus and certiorari.

(ii) The decrees sought to be reviewed are the decree of the Court of Appeals of the State of New York made and entered May 15, 1958 and the order and judgment of the Supreme Court of the State of New York, for the County of Albany, made and entered July 2, 1958. The Notice of Appeal to the Supreme Court of the United States was filed July 26, 1958, in the Supreme Court of the State of New York, County of Albany.

(iii) Jurisdiction of the appeal is conferred on this Court by Title 28 of the United States Code, Section 1257(2).

(iv) Cases sustaining the jurisdiction of this Court are: *Hamilton* v. *Regents of the University of California*, 293 U. S. 245; *Winters* v. *New York*, 333 U. S. 507; *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495; *Commercial Pictures Corporation* v. *Regents of the University of the State of New York*, 346 U. S. 587; *Holmby Productions, Inc.* v. *Vaughn*, 350 U. S. 870.

(v) The validity of Part II of Article 3 of the Education Law of the State of New York is involved. The cited statutes make it unlawful and a penal offense to exhibit motion pictures in a public theater unless the pictures are licensed by the Motion Picture Division of the Education Department of the State of New York. The text of sections 120 to and including 132, comprising the whole of Part II of Article 3 of the Education Law, is set forth in the Appendix.

(c) The Questions Presented by the Appeal.

(1) Whether Sections 122 and 122-a.1 of the Education Law of the State of New York (which provide for the suppression of immoral moving pictures) are so vague and indefinite that their enforcement violates the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

(2) Whether Sections 122 and 122-a.1 of the Education Law of the State of New York, in providing for the ban of immoral (as distinguished from obscene) motion pictures, authorize the suppression of opinion in violation of the First and Fourteenth Amendments to the Constitution of the United States.

(3) Whether Sections 120 to and including 132 of the Education Law of the State of New York, in setting up a system of censorship of motion pictures prior to their publication or exhibition, unlawfully inhibit freedom of expression in violation of the First and Fourteenth Amendments to the Constitution of the United States.

(4) Whether the Appellees, in refusing to permit Appellant to exhibit its film "Lady Chatterley's Lover" in New York, arbitrarily, without due process of law, and

in violation of the Fourteenth Amendment to the Constitution of the United States, deprived Appellant of property rights and of the right freely to express its opinions through the medium of motion pictures.

(d) The Material Facts of the Case.

Appellant is a distributor of motion pictures and the owner of a right to exhibit the moving picture "Lady Chatterley's Lover" in the United States. The film is a faithful version of the expurgated edition of the novel of the same name written by D. H. Lawrence. The edition of the novel on which the film is based is freely sold in the State of New York.

The film deals with the relationships of a woman (Lady Chatterley), her husband (Sir Clifford Chatterley), and her lover (Mellors). The husband is physically crippled and spiritually corrupt. The lover is a symbol of the simple, decent and natural man. In the denouement Lady Chatterley, unable to secure her husband's consent to divorce, sacrifices wealth and social status to go away with Mellors. Her relationship with Mellors, although not sanctioned by law, is portrayed as a true marriage. The motion picture "Lady Chatterley's Lover" is made part of the remittitur in this case and is available for the Court's examination.

In accordance with the provisions of the New York Education Law, the picture was submitted to the Motion Picture Division in or about May 1956. The Division refused to license the film for exhibition unless three purportedly immoral scenes, between Lady Chatterley and her lover Mellors, were deleted. Thereafter Appellant, in accordance with the governing rules and regulations, appealed to the Regents (the Appellees in this appeal)

and requested them to reverse the Division's rulings. In its petition to and argument before the Regents the Appellant submitted that the Division had acted inconsistently and arbitrarily and that the Division erred in judging the entire film on the basis of a few isolated passages taken out of context. The Regents then ruled that the entire picture is immoral. The reason given for the Regents' decision is that the film presents adultery as a desirable, acceptable and proper pattern of behavior.

In October 1956, Appellant petitioned the Supreme Court of the State of New York, Albany County, for an order setting aside the Regents' determination and a judgment declaring the licensing laws unconstitutional. The Supreme Court transferred the proceedings to the Appellate Division of the Supreme Court of the State of New York, Third Department. The Appellate Division granted Appellant's petition on August 1, 1957 on the ground that "the standards [sic] set up in Section 122-a relied upon by the Regents in this case, namely the presentation of adultery or similar 'immoral' acts as 'desirable, acceptable or proper patterns of behavior' is not a permissible standard under the United States Constitution for prior restraint", 4 A. D. 2d 348, at p. 350.

The Regents appealed to the Court of Appeals of the State of New York from the order of the Appellate Division, and on May 15, 1958 the Court of Appeals (3 of the 7 Judges dissenting) reversed the order of the Appellate Division and dismissed Appellant's Petition herein.

The following federal questions sought to be reviewed were raised in the Petition that initiated these proceedings:

> (1) Whether Sections 122 and 122-a.1 of the Education Law of the State of New York are so vague and indefinite that their attempted enforcement violated

the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States (fols. 30-31).*

(2) Whether Sections 122 and 122-a.1 of the Education Law of the State of New York, in providing for suppression of films found to be immoral, permits the suppression of opinion in violation of the rights guaranteed by the First and Fourteenth Amendments to the Constitution of the United States (fols. 29-30).

(3) Whether Sections 120 to and including 132 of the Education Law of the State of New York (Part II of Article 3) contravene the First and Fourteenth Amendments to the Constitution of the United States by setting up a system of licensing and prior censorship of communications (fols. 28-29).

(4) Whether the ban of the picture was unwarranted, unreasonable and unjust and deprived appellant of property rights and its right of communication (fols. 27-28).

The federal questions sought to be reviewed were also raised in the Appellant's arguments and briefs in the Appellate Division and the Court of Appeals of the State of New York. (See reported precis of Appellant's argument preceding the report of the opinion set forth at pages 19-20 of the Appendix.)

The courts passed on the questions raised. The Appellate Division held the statutory provisions authorizing the suppression of films on the grounds of immorality to be unconstitutionally vague (fols. 154-164). The Court of Appeals reversed the Appellate Division and ruled against Appellant on each of the issues raised (Appendix pp. 24-26, 29-31, 36).

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* Folio references are to the numbered folios of the record brought up by appeal.

Only three of the seven judges of the Court of Appeals were of the opinion that the challenged statutes were valid. Judge Desmond, who voted with the majority, did so to afford this Court an opportunity to pass upon the constitutional questions. "Our question," he wrote in his concurring opinion, "is whether New York State may constitutionally refuse exhibition to a film because its subject matter is adultery presented as being right and desirable for certain people under certain circumstances. I confess doubt as to the validity of such a statute but I do not know how that doubt can be resolved unless we reverse here and let the Supreme Court have the final say." (Appendix p. 40).

(e) The Federal Questions are Substantial.

1. *Sections 122 and 122-a.1 of the New York Education Law are so vague and indefinite that they permit arbitrary interference with the right of communication.*

It is unlawful to exhibit a moving picture in New York State unless it has first been approved and licensed by the Motion Picture Division of the Education Department of the State of New York. (Education Law, §129, 131; Appendix pp. 56-57.) The Motion Picture Division is authorized, by Section 122 of the Education Law, to deny a license to a film if it finds such film, or a part thereof, to be ". . . *obscene, indecent, immoral, inhuman, sacrilegious or of such a character that its exhibition would tend to corrupt morals or incite to crime . . .*" (Appendix pp. 52-53).

This Court has twice passed on the section quoted and each time held certain of its terms unconstitutionally vague. In *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, the term "sacrilegious", and in *Commercial Pictures Corp.* v.

Regents, 346 U. S. 587, the terms "immoral" and "of such character that its exhibition would tend to corrupt morals", were held too indefinite to meet the requirements of constitutional due process applicable to a statute regulating the right of speech or the press. The term "indecent" as used in the statute was held unconstitutionally vague by New York in *Capitol Enterprises, Inc.* v. *Regents*, 1 A. D. 2d 990.

In the instant case the Regents found Appellant's film, "Lady Chatterley's Lover" to be immoral. The Regents contend that constitutional objection to the term "immoral" in Section 122 of the Education Law was overcome by the enactment (four months after the *Commercial Pictures Corp.* decision) of Education Law Section 122-a.1, which purports to define the word and limit its application.

It is clear from a reading of Section 122-a.1 that the "definition" is no clearer or more precise than the term defined. Section 122-a.1 provides:

> "For the purpose of section 122 of this chapter, the term 'immoral' and the phrase 'of such a character that its exhibition would tend to corrupt morals' shall denote a motion picture film or part thereof, the dominant purpose or effect of which is erotic or pornographic; or which portrays acts of sexual immorality, perversion, or lewdness, or which expressly or impliedly presents such acts as desirable, acceptable or proper patterns of behavior."

The section is indeed so loosely and poorly drawn, in the light of the prior decisions, that one is justified in concluding that the statute was not intended to clarify the law but to circumvent the ruling of the United States Supreme Court in the *Commercial Pictures Corp.* case, 346 U. S. 587.

The terms "erotic", "pornographic", "lewdness", "proper patterns of behavior", etc. which purport to define the term "immoral" in Section 122-a of the Education Law do not purge the word "immoral" of ambiguity. They are merely terms of disapprobation. Their application to a given film is a denunciation, not an objective description of the content to be suppressed. The terms do not impose any standards limiting the exercise of the censor's discretion, nor do they furnish any guide to the motion picture producer, or distributor.

As Judge Dye wrote of Section 122-a.1 in his dissenting opinion in the court below: "However well intentioned, the language as used still falls short of providing fundamental standards deemed essential for the guidance of administrative discretion. The added words are no more meaningful than the term 'sacrilegious', 'immoral', 'tend to incite to crime', 'prejudicial to the best interests', 'harmful and indecent', all found too general and unprecise to meet constitutional standards (*Joseph Burstyn, Inc.* v. *Wilson, supra; Matter of Commercial Pictures* v. *Board of Regents, supra; Winters* v. *New York*, 333 U. S. 507; *W. L. Gelling* v. *Texas*, 343 U. S. 960; *Superior Films* v. *Department of Educ. of Ohio*, 346 U. S. 587, *supra; Matter of Excelsior Pictures Corp.* v. *Regents*, 3 N. Y. 2d 237; *Holmby Prods* v. *Vaughn*, 350 U. S. 870; *Hallmark Prods.* v. *Carroll*, 384 Pa. 348). The term 'immoral' as used in section 122 has not been clarified by the amendment. It is still vague and indefinite. When the censor relies on the term 'immoral' as a basis for prior restraint, he necessarily must resort to his own notion of its meaning since the statute itself provides no test or standards to guide him in the exercise of his discretion. As the learned Justice, writing for the court below, succinctly pointed out: 'A statute which leaves any field open to the opinion,

discretion or individual point of view of a censor in barring a moving picture violates the Fourteenth Amendment' " (Appendix p. 43).

2. *Sections 122 and 122-a.1 of the New York Education Law contravene the First and Fourteenth Amendments to the United States Constitution in authorizing suppression of opinion.*

The picture "Lady Chatterley's Lover" was suppressed because the ideas it presented were thought evil, not because of the manner in which the ideas were presented. The film was banned because it presented adultery under the circumstances portrayed as acceptable behavior, because its theme is the "conquest of love over the 'form' of marriage" (Appendix p. 23) (fol. 85). Although there is an attempt in the prevailing opinion (Appendix pp. 26-27) to equate "immorality" as used in the Sections 122 and 122-a.1 of the New York Education Law with obscenity (held outside the area of constitutionally protected speech in *Roth* v. *United States*, 354 U. S. 476)*, the picture was not found obscene. As Judge Dye noted in his dissenting opinion in the New York Court of Appeals: "No one contends that the film in question is obscene within the narrow legal limits of obscenity as recently defined by the Supreme Court in the application of which that court has said it is vital 'that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest' (*Roth* v. *United States*, 354 U. S. 476, 488; *Matter of Excelsior Pictures Corp.* v. *Regents*, 3 N. Y. 2d 237, *supra*; *Holmby Prods* v. *Vaughn*, 350 U. S. 870, *supra*)

* See also *Times Film Corporation* v. *City of Chicago*, in which the court attempted unsuccessfully in the same manner to give precision to the term. 244 Fed. 2d 432, at p. 435, rev'd 355 U. S. 35. See also *Winters* v. *New York*, 294 N. Y. 545, rev'd 333 U. S. 507.

. . . . **The Regents have banned a showing of this film in its entirety because, in their opinion, its theme is *contra bonos mores*, and this in the face of the circumstance that the book on which it is based has long been published and circulated freely without benefit of administrative censorship" (Appendix pp. 43-44).**

Only three kinds of utterance have been held by this Court to be outside the area of Constitutionally protected expression. They are: libelous statements (*Beauharnais* v. *Illinois*, 343 U. S. 250); obscenity (*Roth* v. *United States*, 354 U. S. 476); and speech threatening violent destruction of the Government if such speech is coupled with a plan or conspiracy to carry it into effect (*Dennis* v. *United States*, 341 U. S. 494).

The statutes under consideration seek to extend the area of unprotected communication to speech challenging the moral standards of the community. The statement of an idea, even if its adoption would be destructive of the moral order, is within the protection of the First and Fourteenth Amendments. As Justice Douglas wrote in dissent in the *Roth* case:

> **"... if the First Amendment guarantee of freedom of speech and press is to mean anything in this field, it must allow protests even against the moral code that the standard of the day sets for the community. In other words, literature should not be suppressed merely because it offends the moral code of the censor" (354 U. S. 476, at p. 513).**

It will be remembered that, in the *Dennis* case, it was not the statement of the doctrine of the forcible overthrow of the Government that was held punishable, but the advocacy of the doctrine pursuant to a conspiracy to carry it into effect (341 U. S. 512-513).

The stated purpose of the New York Legislature in enacting Section 122-a of the Education Law was to protect

"not . . . the mature and intelligent, with minds strengthened to withstand the influence of salacious presentations, but . . . the young and immature, the ignorant and the sensually and criminally inclined" (State Education Department Memorandum, New York State Legislative Annual, 1954, p. 37). A statutory restriction of the expression of ideas to those suitable for the immature, the ignorant and the sensually and criminally inclined is an unconstitutional curtailment of the right of communication (*Butler* v. *Michigan*, 352 U. S. 380; *Roth* v. *United States*, 354 U. S., at pp. 488, 489).

3. *The New York Film Licensing Laws impose an unconstitutional prior restraint on freedom of expression.*

Education Law §§ 120-132 sets up a system for the inspection and licensing of all films by an administrative body before they can be publicly exhibited. The statutes authorize the licensors to determine what may or may not be shown in public theaters. In providing for supervision over communication in advance of publication or exhibition, the laws violate the constitutional guaranties of free speech and press and are therefore void in their entirety.

The First Amendment guaranty of freedom of expression was adopted primarily to prevent censorship prior to publication. *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 503-505; *Lovell* v. *City of Griffin*, 303 U. S. 444, 451-452; *Near* v. *Minnesota*, 283 U. S. 697, 713-716; *Patterson* v. *Colorado*, 205 U. S. 454, 462; *Brattle Films Inc.* v. *Commissioner of Public Safety*, 333 Mass. 58.

The statute involved in *Burstyn* v. *Wilson*, 343 U. S. 495, is the one under consideration here, namely, Article 3, Part II, of the New York Education Law. Because it was unnecessary to a determination of that appeal, the Supreme Court did not strike down the entire censorship law. But

the Court observed, in its opinion in the *Burstyn* case, that there is a basis for holding that the laws establish a constitutionally prohibited system for censorship in advance of publication or distribution. Mr. Justice Clark, speaking for the Court said at pages 503-504: "The statute involved here does not seek to punish, as a past offense, speech or writing falling within the permissible scope of subsequent punishment. On the contrary, New York requires that permission to communicate ideas be obtained in advance from state officials who judge the content of the words and pictures sought to be communicated. This Court recognized many years ago that such a previous restraint is a form of infringement upon freedom of expression to be especially condemned. *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697 (1931). The Court there recounted the history which indicates that a major purpose of the First Amendment guaranty of a free press was to prevent prior restraints upon publication, although it was carefully pointed out that the liberty of the press is not limited to that protection. It was further stated that 'the protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases.' Id., at 716. In the light of the First Amendment's history and of the *Near* decision, the State has a heavy burden to demonstrate that the limitation challenged here presents such an exceptional case." (See also *Kingsley Books, Inc.* v. *Brown*, 354 U. S. 436, at p. 441.)

The burden to demonstrate any justification for the repressive law under consideration has not been sustained by the State of New York. As Judge Dye said in his dissent in the Court of Appeals, "A motion picture film should not be singled out as a subject for prior restraint under the beneficent guise of regulating community mores, any more than the prior censorship of press, books, the theatre or

other media of communication which, as we know, includes a motion picture. Censorship under such guise is a type of paternalism that lends itself to the whim and caprice of the administrator. Whenever tested, censorship of motion picture film in advance has been disapproved. All but six States in the Union either do not have any film censorship in advance or have discontinued such practice. It should be noted that discontinuance of administrative censorship of motion picture film in advance is not likely to create a vacuum for carte blanche exhibition of indecent films, so long as we have on our statute books appropriate penal laws to deal with the suppression of legally offensive motion picture film and the punishment of its exhibitors (cf. Penal Law, §§1141, 1141-a; Code Crim. Pro., §22-a; *Brown* v. *Kingsley Books*, 1 N. Y. 2d 177, aff'd 354 U. S. 436)" (Appendix pp. 44-45).

4. *There Is No Reasonable Basis for the Suppression of the Film "Lady Chatterley's Lover."*

In addition to the question of the validity of the statutes under consideration, there is the question of whether the suppression of the particular film violates the constitutional guaranty of freedom of speech and press. The film "Lady Chatterley's Lover" is not "of a character that the First Amendment permits a State to exclude from public view." (See opinion of Mr. Justice Reed concurring in *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, at pp. 506-7.)

Chief Judge Conway's opinion in the court below suggests that the meaning of the term "immoral" is so definite and precise that it may be automatically applied (Appendix pp. 23, 25) and that according to the mores of the community, every adulterous relationship must be deemed immoral no matter what the circumstances (Appendix p. 24) (Cf. *United States* v. *Rubia*, 110 F. 2d 92;

Petitions of Rudder, et al., 159 F. 2d 695; *United States* v. *Francioso*, 164 F. 2d 163; *Schmidt* v. *United States*, 177 F. 2d 450; *Petition of R.....*, 56 F. Supp. 969; *Petition of Lieberman*, 50 F. Supp. 121). Even if we assume that to be correct, for the argument of this question, a communication which has even slight social value or importance may not be proscribed. *Roth* v. *United States*, 354 U. S. 476, at p. 484. The film "Lady Chatterley's Lover" unquestionably does have some social value and importance, and for that reason may not be prohibited.

As Judges Desmond (concurring) and Fuld (dissenting) pointed out in their opinions in the New York Court of Appeals, the picture is based upon "a novel of great fame by an eminent author." (Appendix pp. 38, 45; see *Roth* v. *United States*, 354 U. S., at p. 498). Its seriousness of purpose and artistic merit cannot be gainsaid. Its principal theme is that the essential element of a lasting relationship between a man and woman is love; that a true marriage exists where there is love, understanding and self sacrifice and not where there is merely a formal relationship sanctioned by law. Its secondary theme is the destructive impact of industrialization and mechanization upon natural beauty, upon personality, and upon life. Whether or not one accepts or agrees with Lawrence's views, the right to state, proclaim or dramatize them by any means of communication, including the film, may not be denied.

5. *The Questions Presented Are So Substantial as to Require Plenary Consideration.*

Freedom of communication, as this Court has always recognized, is "the indispensable condition for the maintenance and progress of a free society." *Butler* v. *Michigan*, 352 U. S. 380, at p. 384. Any erosion of that freedom,

or attempt by a State Government to limit it, warrants this Court's intervention. *Roth* v. *United States*, 354 U. S. 476 at p. 488. There is ample authority to support appellant's contention that the statutes under consideration are an unconstitutional limitation of the right of expression.

In *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, this Court indicated hostility to censorship in advance of publication or distribution. Because it was unnecessary to a determination of the appeal in the *Burstyn* case, the Court did not strike down the entire licensing law as a system of prior censorship. After the *Burstyn* case was decided there were a number of cases in which similar problems were presented to this Court. The *per curiam* opinions in each of those cases consisted of an oracular reference to *Burstyn* and other cases. *W. L. Gelling* v. *State of Texas*, 343 U. S. 960; *Superior Films* v. *Dept. of Education*, 346 U. S. 587; *Commercial Pictures Corp.* v. *Regents*, 346 U. S. 587; *Holmby Productions Inc.* v. *Vaughn*, 350 U. S. 870; *Times Film Corp.* v. *City of Chicago*, 355 U. S. 351.

The State courts and lower Federal courts have variously interpreted the rulings of this Court in *Burstyn* and the later cases to mean that prior censorship of motion pictures is unconstitutional, or that it is generally permissible, or that it is permissible only if such censorship is on the ground of obscenity. (See *Brattle Films, Inc.* v. *Com'r of Public Safety*, 333 Mass. 58; *Matter of Excelsior Pictures Corp.* v. *Regents*, 3 N. Y. 2d 237 (Desmond, J.); *Hallmark Productions, Inc.* v. *Carroll*, 384 Pa. 348; *Commercial Pictures Corp.* v. *Regents*, 305 N. Y. 336, rev'd 346 U. S. 587; *Superior Films* v. *Dept. of Education*, 159 Ohio St. 315, rev'd 346 U. S. 587; *Holmby Productions Inc.* v. *Vaughn*, 177 Kan. 728, rev'd 350 U. S. 870; *Times Film Corp.* v. *City of Chicago*, 244 Fed. 2d 432, rev'd 355 U. S. 351; and the 5 appended opinions in the instant

case.) It is respectfully submitted that a plenary consideration of the basic question presented on this appeal, and a statement of this Court's position after such consideration, will avoid further confusion and a multiplicity of further suits.

September 21, 1958

Respectfully submitted,

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APPENDIX.

The Opinions Below.

MATTER OF KINGSLEY CORP. *v.* REGENTS [4 N. Y. 2d 349] 349 to 375

In the Matter of Kingsley International Pictures Corporation, Respondent, against Regents of the University of the State of New York, Appellant.

Points of Counsel.

Appeal from an order of the Appellate Division of the Supreme Court in the third judicial department, entered August 1, 1957, which (1) annulled a determination of the Board of Regents of the University of the State of New York denying a license for the exhibition of a motion picture, and (2) remitted the matter to the License Division of the Motion Picture Division of the State Department of Education with a direction to issue a license for such exhibition.

Charles A. Brind, Jr., John P. Jehu, Elizabeth M. Eastman and George B. Farrington for appellants. The Regents had no choice under the Education Law but to refuse to license this picture. (*Joseph Burstyn, Inc.*, v. *Wilson*, 343 U. S. 495; *Commercial Pictures Corp.* v. *Regents of Univ. of State of N. Y.*, 346 U. S. 587.)

Louis J. Lefkowitz, Attorney-General (Ruth Kessler Toch and Paxton Blair of Counsel), for appellants. The collection of a fee pursuant to the statute when a film is licensed does not violate any provision of the Constitution of the United States or of this State. (*National Broadcasting Co.* v. *United States*, 319 U. S. 190; *Matter of Excelsior Pictures Corp.* v. *Regents of Univ. of State of N. Y.*, 3 N. Y. 2d 237; *Joseph Burstyn, Inc.*, v. *Wilson*, 343 U. S. 495; *Gelling* v. *Texas*, 343 U. S. 960; *Superior Films* v. *Department of Educ.*, 346 U. S. 587; *Holmby Prods.* v. *Vaughn*, 350 U. S. 870; *Patapsco Guano Co.* v. *North Carolina*, 171

U. S. 345; *McLean* v. *Denver & Rio Grande R. R. Co.*, 203 U. S. 38; *Red "C" Oil Co.* v. *North Carolina*, 222 U. S. 380; *Freuhauf Trailer Co.* v. *State Corp. Comm.*, 149 Kan. 465; *United States* v. *Rumely*, 345 U. S. 41; *Murdock* v. *Pennsylvania*, 319 U. S. 105; *Grosjean* v. *American Press Co.*, 297 U. S. 233; *Giragi* v. *Moore*, 48 Ariz. 33; *People ex rel. D. W. Griffith, Inc.*, v. *Loughman*, 249 N. Y. 369; *New York* v. *Latrobe*, 279 U. S. 421; *Alexander Theatre Ticket Office* v. *United States*, 23 F. 2d 44; *F. Couthoui, Inc.*, v. *United States*, 54 F. 2d 158, 285 U. S. 548; *Apollo Operating Corp.* v. *Anderson*, 55 F. 2d 66.)

Ephraim S. London and Stephen A. Wise for respondent. I. Section 122, as modified by section 122-a of the Education Law, is so vague and indefinite that the attempted enforcement of the statute in the instant case deprived appellee of its rights and property without due process of law. (*Jordan* v. *De George*, 341 U. S. 223; *Musser* v. *Utah*, 333 U. S. 95; *Winters* v. *New York*, 333 U. S. 507; *United States* v. *Capital Traction Co.*, 34 App. D. C. 592; *Commercial Pictures Corp.* v. *Regents of Univ. of State of N. Y.*, 346 U. S. 587; *Joseph Burstyn, Inc.*, v. *Wilson*, 343 U. S. 495; *Gelling* v. *Texas*, 343 U. S. 960; *Superior Films* v. *Department of Educ.*, 346 U. S. 587; *Matter of Excelsior Pictures Corp.* v. *Regents of Univ. of State of N. Y.*, 3 N. Y. 2d 237; *Holmby Prods.* v. *Vaughn*, 350 U. S. 870; *Hallmark Prods.* v. *Carroll*, 384 Pa. 348; *Matter of Commercial Pictures Corp.* v. *Board of Regents*, 305 N. Y. 336; *Kedroff* v. *St. Nicholas Cathedral*, 344 U. S. 94; *Lamport* v. *Smedley*, 213 N. Y. 82.) II. There is no reasonable basis for appellants' determination that the film "Lady Chatterley's Lover" is immoral. (*Roth* v. *United States*, 354 U. S. 476.) III. As applied and interpreted by appellants, sections 122 and 122-a of the Education Law authorize the suppression of opinion and thus contravene the First and Fourteenth Amendments of the United States Constitution. (*Dennis* v. *United States*, 341 U. S. 494; *Marsh* v. *Alabama*, 326 U. S. 501; *Thomas* v. *Collins*, 323 U. S. 516; *Thornhill* v. *Alabama*,

310 U. S. 88; *De Jonge* v. *Oregon*, 299 U. S. 353; *Stromberg* v. *California*, 283 U. S. 359; *Butler* v. *Michigan*, 352 U. S. 380.) IV. The New York Film Licensing Law imposes an unconstitutional prior restraint on freedom of expression. (*Joseph Burstyn, Inc.*, v. *Wilson*, 343 U. S. 495; *Lovell* v. *City of Griffin*, 303 U. S. 444; *Near* v. *Minnesota*, 283 U. S. 697; *Patterson* v. *Colorado*, 205 U. S. 454; *Brattle Films* v. *Commissioner of Public Safety*, 333 Mass. 58; *Matter of Excelsior Pictures Corp.* v. *Regents of Univ. of State of N. Y.*, 3 N. Y. 2d 237.) V. The New York Film Censorship Law imposes a tax on the right of communication, and therefore violates the constitutional guarantee of freedom of expression. (*City of Blue Is.* v. *Kozul*, 279 Ill. 511; *Magnano Co.* v. *Hamilton*, 292 U. S. 40; *Stewart Dry Goods Co.* v. *Lewis*, 294 U. S. 550.)

Opinion per Chief Judge Conway

Chief Judge Conway. This case presents us again with the question of the constitutionality of our motion picture licensing law. Undoubtedly this is often a question of the greatest delicacy. But as we ponder this particular case and what is involved here, we perceive no necessity for apprehension as to the justice or constitutionality of the Board of Regents' determination to deny a license to this film, "Lady Chatterley's Lover". This denial was based upon sections 122 and 122-a of the Education Law which *require* the denial of a license to motion pictures which are immoral in that they *portray* "acts of sexual immorality * * * as desirable, acceptable or proper patterns of behavior." *It is this portion of the statute only which concerns us here.* The vileness of the matter it seeks to reject is clear. It embraces not only films which are visually suggestive and obscene, nor only those which are sexually suggestive and immoral in theme, but those which combine the two. The statutory rejection is aimed at those films which, not being satisfied with portraying scenes of rank obscenity, go further and recommend sexually immoral acts, thus

portrayed in a manner appealing to the prurient interest, as proper conduct for the people of our State.

Having clarified the substance of what this case involves, we proceed to a consideration of the several issues raised. And we approach them with confidence in our Legislature, concern for our people, and a firm conviction of our solemn constitutional duty which requires us not only to protect the individual from oppressions of government, but the government and the people from abuses by the individual.

This film deals with the relationships of Lady Chatterley with her husband, Sir Clifford Chatterley, and her lover, Mellors. Sir Clifford returned to his wife from the wars as a cripple doomed to a life in a wheelchair. His war injury rendered him impotent to father offspring. By the standards of the community in which he lived, he was a man of affluence, owning a mine and extensive lands. His status was comparable to that of a feudal lord, and much like a feudal lord he was gravely concerned over the fact that he neither had, nor would have, an heir. This led him to propose to his wife, Lady Chatterley, that she have sexual relations with another man of her own choosing so that she might bear an heir for Sir Clifford. Lady Chatterley appeared to reject this idea, inquiring of her husband whether he still loved her, and whether it would be wise to do such a thing since the possibility existed that she might fall in love with the man to whom she would give her body. Sir Clifford explained that his desire for her to have a child was the highest possible expression of his love, and he pointed out that another love could not be born of the purely physical relationship which he anticipated she would have with such a man. No more was said, and Lady Chatterley left her husband's bedroom in which they had been talking.

Subsequently, Lady Chatterley's sister suggested that she take a vacation from the arduous task of caring for her crippled husband. The city of Vienna was suggested, and Sir Clifford heartily indorsed this idea, thinking that such

a trip would provide his wife with the ideal circumstances for choosing a lover and committing adultery with him.

Before going to Vienna, Lady Chatterley made the acquaintance of Mellors, Sir Clifford's gamekeeper. Mellors was a married man, but was living apart from his wife. It was not long before Lady Chatterley and Mellors indulged in adultery. Scenes of their passion were portrayed. Their *affaire*, climaxed by the pregnancy of Lady Chatterley, was unfolded through a series of clandestine bedroom scenes during which the two were shown lying in bed in a state of apparent undress before, and again after, acts of adultery; during which Mellors assisted Lady Chatterley in her preparations for the sexual act by unbuttoning her blouse and unzipping her dress; during which Mellors expressed his passion by caressing her buttocks, after reaching with his hand under her dress, noting that she had obligingly come to him clad only in a dress, without undergarments; during which numerous other words, gestures and motions were employed to provide the atmosphere prefatory and subsequent to acts of adultery; and during which, at Lady Chatterley's instigation, Mellors removed from the wall above the mantle piece in his living room a large framed picture of his wife and destroyed both frame and picture. The scenes were set, interrupted only by brief canvasses of darkness, upon which the imagination was permitted to complete the picture of illicit sexual love. Out of these intimacies was born a "love" between Lady Chatterley and her lover Mellors which each regarded as binding them in a true marriage, although not a marriage solemnized by church or state, and although their respective spouses were living.

Events followed quickly on the heels of Lady Chatterley's pregnancy—her trip to Vienna, Mellors' dismissal by Sir Clifford because of scandalous "rumors" regarding the two, and her return to the manor. When she returned, Mellors was packing his things in preparation for his departure from the estate. She went first to Mellors to

profess her love and to tell him that she would forsake her husband, her wealth and her position to live with him. She then went to her husband to admit the truth of the "rumor" and to tell him of her decision to live with Mellors. Sir Clifford refused to agree to a divorce and insisted that he be given the child when it should be born. Lady Chatterley rejected that and returned to Mellors. The curtain falls as Lady Chatterley and her lover leave his abode for what apparently was regarded by their neighbors who witnessed it from their porches and doorways as a life of illicit intimacy. We make brief mention also of another scene in which Mellors' wife apparently indulges in an act of intercourse with another man beside a body of water.

The dominant theme of the film may be summed up in a few words—exaltion of illicit sexual love in derogation of the restraints of marriage. Their relationship was presented as a true marriage. Their complete surrender to the baser instincts was presented as a triumph over the social mores. Their decision to live in adultery was quietly heralded as a conquest of love over the "form" of marriage. And this entire theme was woven about scenes which unmistakably suggested and showed acts of sexual immorality.

That such is the theme of this motion picture is not open to doubt, particularly in light of respondent's own statement in its brief that the principal theme is that a true marriage exists where there is love, "not when there is merely a formal relationship sanctioned by law." And indeed, in its petition to the Board of Regents, respondent stated that "[h]er [Lady Chatterley's] relationship with Mellors, although not sanctioned by law, is portrayed as a true marriage." Thus, this film unquestionably presents adultery as a proper pattern of behavior. And it does so employing several scenes of obscenity.

However, respondent suggests that the film is nevertheless not immoral according to the mores and moral stand-

ards of the community. We think it is beyond cavil that the moral standards and mores of the people of the State of New York (indeed, of our nation) brand adultery as immoral and illegal. The relationship between Lady Chatterley and Mellors was precisely that—adultery. To urge that such conduct is not immoral constitutes a confession of values so condemnable as not to warrant further comment. The determination by the Board of Regents, a constitutional body, that this picture is utterly immoral in its theme, and that it presented adultery as proper behavior, was entirely correct as measured by the standards of our community. But beyond that, the Legislature specifically designated such a motion picture as immoral, and the determination by the Regents was mandated by statute. Indeed, adultery has been decreed to be immoral since Moses received the Commandments on Mount Sinai. Any suggestion that this film merely demonstrates the necessity for love in marriage insults a concept of the profoundest nobility, and fails to recognize the clear and familiar distinction between licit and illicit love. To urge that this motion picture merely points up the necessity for love in marriage ignores the facts and the story—the whole context.

It is next urged that this statute is unconstitutionally vague and indefinite. The United States Supreme Court has established the necessary principle that motion picture licensing may be conducted only pursuant to a statute which is so clear in its terms that the licensor is furnished with a definite standard which he may apply (*Joseph Burstyn, Inc.*, v. *Wilson*, 343 U. S. 495, 504-505; see also, *Superior Films* v. *Department of Educ. of Ohio* and *Commercial Pictures Corp.* v. *Board of Regents*, 346 U. S. 587). The purpose underlying this principle is to divest the licensor of unlimited restraining power based upon his own judgment of what shall or shall not be licensed—to avoid what may be denominated as discretionary censorship. The standard

under consideration here is as explicit and restrictive in its terms as words permit. Our Legislature through section 122-a *requires* the denial of a license to any motion picture which *portrays* acts of sexual immorality (here adultery) as proper behavior. No one will deny that the Regents of New York State, just as the members of this court, know what an act of sexual immorality is, and that adultery is such an act. This standard leaves no area of judgment or speculation open to the Regents in which they might arrive at personal judgments as to what constitutes immorality. Their sole function under the statute is the fact-finding function as to whether a particular motion picture portrays acts of sexual immorality as proper behavior. If it does, it is *ipso facto* immoral by statutory mandate. To hold that this standard is vague or indefinite would be to hold that the requirement of definiteness expounded in the *Burstyn* case is impossible to satisfy.

It should be noted that section 122-a was enacted by our Legislature in 1954 in an attempt to comply with the decision without opinion of the United States Supreme Court in the *Commercial Pictures* case (*supra*). When that case was decided, there was no statutory definition whatever of the word "immoral." We held, in rather general terms, as distinguished from the customary specificity of statutes, that the word "immoral" related to "standards of sexual morality" (*Matter of Commercial Pictures Corp.* v. *Board of Regents*, 305 N. Y. 336, 346). On appeal to the United States Supreme Court, our decision was reversed without opinion on the authority of the *Burstyn* case (*supra*) which held only, by express limitation in that opinion, that the word "sacrilegious" is too vague and indefinite. The portion of section 122-a which we are considering here, for the first time, defines the word "immoral" much more explicitly than this court construed it in *Commercial Pictures*. Thus, while we reach our conclusion that this standard is definite independently of *Commercial Pictures*, it may be pointed

out that our decision there also leads to this result. Furthermore, the reversal without opinion by the Supreme Court in that case cannot be deemed to be dispositive of the new, different, and more explicit language employed in section 122-a *as it applies here.*

Respondent next argues that expression of *opinion* may not be suppressed in the absence of a showing of clear and present danger of substantive evil to the community. It should first be emphasized that the scope of section 122-a is not mere expression of opinion in the form, for example, of a filmed lecture whose subject matter is the espousal of adultery. We reiterate that this case involves the espousal of sexually immoral acts (here adultery) *plus* actual scenes of a suggestive and obscene nature. The question, then, is whether such a motion picture must be *shown* to present a clear and present danger of substantive evil to the community.

Respondent's argument fails to recognize the evil and danger to society which *inheres* in expressions which debase fundamental sexual morality by portraying its converse to the people as alluring and desirable. Such expression has been universally and traditionally condemned by our national society—its inherent evil dependent not at all on the times. It is the very nature and function of such expression to corrupt the public morals. The United States Supreme Court has said that the prevention and punishment of such expression has "never been thought to raise any Constitutional problem", and that "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is *clearly outweighed by the social interest in order and morality.*" (*Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571-572; see, also, *Beauharnais* v. *Illinois*, 343 U. S. 250, 256, 257; emphasis added). Thus, in *Roth* v. *United States* (354 U. S. 476), it was held that "obscenity is not protected speech" and that, therefore, there is no need to consider whether "obscene material will

perceptibly create a clear and present danger of antisocial conduct" (p. 486). It was noted that obscenity has always been rejected as utterly without redeeming social importance (p. 484). But obscenity is only one word which, among others, signifies "that form of immorality which has relation to sexual impurity" (*Swearingen* v. *United States*, 161 U. S. 446, 451). All these words—indecent, immoral, obscene, lewd, lascivious, etc.—refer to the same substantive evil, viz., sexual impurity and immorality. (See *Swearingen* v. *United States*, *supra*; *Matter of Excelsior Pictures Corp.* v. *Regents*, 3 N. Y. 2d 237, 243; *People* v. *Winters*, 294 N. Y. 545, 550, revd. on other grounds, 333 U. S. 507; *People* v. *Muller*, 96 N. Y. 408.) Their definitions in legal dictionaries reveal they are used interchangeably. They have the same meaning as in common-law prosecutions for obscene libel (*Swearingen* v. *United States*, *supra*, p. 451; *Matter of Dampier*, 46 Idaho 195; *State* v. *Scope*, 46 Del. 519), which embraced any writings, pictures or the like "of an immoral or an illegal tendency" (4 Blackstone's Comm., p. 150), and "such indecent or immoral publications as tend to destroy the love of purity, morality and virtue, and corrupt the public morals." (Chase, Blackstone's Comm., p. 916, n. 3; see *Rex* v. *Curl*, 2 Str. 788, 93 Eng. Rep. 849). At common law every public show and exhibition which was contrary to good morals was indictable (1 Bishop on Criminal Law, § 504). And so, "freedom of speech • • • does not permit the publication of • • • indecent articles, or other publications injurious to public morals • • •." (*Robertson* v. *Baldwin*, 165 U. S. 275, 281.)

Our conclusion, therefore, is the same as that of the United States Supreme Court in the *Roth* case (*supra*). It is unnecessary to consider whether a motion picture which alluringly portrays sexually immoral acts as proper behavior does, in fact, present a clear and present danger of substantive evil to the community, if indeed such could reasonably be doubted. There is no difference in substance between motion pictures which are corruptive of the public

morals, and sexually suggestive, because of a predominance of suggestive scenes, and those which achieve precisely the same effect by presenting only several such scenes in a clearly approbatory manner throughout the course of the film. *The law is concerned with effect, not merely with but one means of producing it. We do not believe that a film which is rank pornography is objectionable simply because it excites a human appetite. Rather, the objection lies in the corrosive effect upon the public sense of sexual morality.* The principle which has always prompted the rejection of obscenity is the "social interest in order and morality." (*Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571-572, *supra; Beauharnais* v. *Illinois*, 343 U. S. 250, 256, 257, *supra*).

Essentially, then, the question amounts to this: What can society do about protecting itself from motion pictures which are corruptive of the public morals? We hold that it may refuse to license a motion picture which alluringly portrays adultery as proper behavior. We so hold with full confidence that our Founding Fathers never intended that our Federal Constitution be the altar upon which this State, and this nation, must sacrifice themselves to the ravages of moral corruption. Our Constitution is a document for government, not a tool for anarchy or a license for corruption.

Our holding that a license may constitutionally be denied under the circumstances presented here is well supported in principle by our prior decisions (see *Matter of Excelsior Pictures Corp.* v. *Regents, supra; Matter of Commercial Pictures Corp.* v. *Board of Regents, supra*). We noted in *Excelsior* that sexual immorality is the only legal basis for censorship, keeping in mind that the licensing statute must be very clear. While we noted in *Excelsior* (*supra*, p. 240) that "[w]e will not * * * quibble or quarrel as to concepts of decorum or delicacy or manners", it would seem unnecessary to stress that adultery is not a mere matter of etiquette. Moreover, we view the several decisions of the Supreme Court as indicating the validity of motion picture

licensing directed against sexual immorality *provided* the licensing statute clearly delineates the standard which the licensors are to apply. (See *Commercial Pictures Corp.* v. *Board of Regents, supra; Superior Films* v. *Department of Educ. of Ohio, supra; Joseph Burstyn, Inc.*, v. *Wilson, supra.*) We would be content to rest our decision upon this precedent were it not that the dearth of authoritative opinions leaves the law of motion picture licensing in a state of some uncertainty. Hence, we proceed to further discussion.

Strictly from a pragmatic standpoint, public morality is essential to a civilized society. "History bears witness to the fate of peoples who have been indifferent to the vice of indiscriminate sexual immorality—a most serious threat to the family, the home and the State." (*Matter of Commercial Pictures Corp.* v. *Board of Regents*, 305 N. Y. 336, 342, *supra.*) "The destruction of morality renders the power of the government invalid, for government is no more than public order. It weakens the bands by which society is kept together." (*Commonwealth* v. *Sharpless*, 2 Serg. & Rawl. 91, 103 [Pa. 1815].) Thus, it has always been true that the preservation of public morality is a proper subject for the exercise of the police power. And the Constitutional right freely to express one's thoughts has never been thought to divest society of its right and duty to preserve fundamental public sexual morality. (*Chaplinsky* v. *New Hampshire, supra*, pp. 571-572.) Thus, sexually impure utterances tending to corrupt the public morals have always been criminally punishable. Very recently, the United States Supreme Court sustained the injunctive process as a perfectly constitutional remedy whereby a State may protect its people from the evil effects of obscene books. (*Kingsley Books* v. *Brown*, 354 U. S. 436.) The *Kingsley* case has put to rest the claim that no prior restraint is constitutionally permissible. That court said: "The phrase 'prior restraint' is not a self-wielding sword. Nor can it serve as a talismanic test." (p. 441.) Stress was laid on the fact that upon the courts falls the duty of close analysis

and a pragmatic assessment of the operation of the statute under particular circumstances. We apply these thoughts also to the remedy of motion picture licensing.

We do not regard the word "censorship" as a self-wielding sword and we reject it as a talismanic test. Whatever may be the constitutional inhibition against the licensing of books, which were a communicative medium familar to our forefathers, we cannot conclude that motion pictures must be regulated in precisely the same fashion. It has been observed that "[t]he various forms of modern so-called 'mass communications' raise issues that were not implied in the means of communication known or contemplated by Franklin and Jefferson and Madison. * * * Movies have created problems not presented by the circulation of books, pamphlets, or newspapers * * *." (*Kovacs* v. *Cooper*, 336 U. S. 77, 96.) And thus, the Supreme Court declared six years ago, when it first held motion pictures to be within the general protection of the First and Fourteenth Amendments, that:

"To hold that liberty of expression by means of motion pictures is guaranteed by the First and Fourteenth Amendments, however, is not the end of our problem. It does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places. * * * *Nor does it follow that motion pictures are necessarily subject to the precise rules governing any other particular method of expression. Each method tends to present its own peculiar problems.*" (*Joseph Burstyn, Inc.*, v. *Wilson, supra*, pp. 502-503; emphasis added.)

A contention that motion pictures must be subject to only the same type of regulation as books is "sterile argumentation [which] treats society as though it consisted of bloodless categories" (*Kovacs* v. *Cooper, supra*, p. 96). The greater capacity for evil which inheres in motion pictures has been recognized by the highest Federal tribunal as "relevant in determining the permissible scope of commu-

nity control" (*Joseph Burstyn, Inc.*, v. *Wilson, supra*, p. 502). We heed the warning of Justice HOLMES that "'[t]o rest upon a formula is a slumber that, prolonged, means death'", and we obey the admonition of Justice FRANKFURTER, as he pondered this thought, against "mechanical jurisprudence through the use of oversimplified formulas." (*Kovacs* v. *Cooper, supra*, p. 96.) "The tyranny of labels • • • must not lead us to leap to a conclusion that a word which in one set of facts may stand for oppression or enormity is of like effect in every other." (*Palko* v. *Connecticut*, 302 U. S. 319, 323.) To deny the remedy of licensing as against motion pictures under circumstances such as those disclosed here would be to ignore the spirit and purpose of our Federal Constitution which has always been deemed to permit society to employ remedies which are adequate to protect itself from corruption of public sexual morality. Law, *particularly* constitutional law, is the means whereby society is preserved and held intact. Catch phrases such as "no movie licensing" do nothing to subserve that end. We are molding constitutional *justice*, and have no interest in perpetuating as a motto a concept which was valid *as intended and as applied*, in past history, but not as some seek to extend it today in total disregard of the progress of civilization and the consequences of change, both good and evil. The constitutionality of this statute must be assessed pragmatically in terms of its necessity to society in exercising its vital and recognized right to preserve the public morality.

In considering the question of motion picture licensing, this court has pointed out that "[n]o other method will afford reasonably adequate protection to the public." (*Matter of Commercial Pictures Corp.* v. *Board of Regents, supra*, pp. 343, 351). We are not concerned here with licensing books, pamphlets, newspapers, etc., the traditional media of expression. Moving pictures are our only concern and, what is more to the point, only those motion pictures which alluringly present acts of sexual immorality as

proper behavior. This is not a case of a book on a shelf or in a home—it is a case of *mass* dissemination of approved illicit sex by the spoken word and a visual art. It is a case not of one showing but hundreds of showings. It is a case not of an audience of one, but audiences of hundreds—in some cases thousands—at *each* showing. It is a case not merely of a theme of words, but a theme woven about scenes clearly portraying and suggesting acts of adultery. Bearing in mind the broad scope of motion picture presentation, how may society effectively discharge its responsibility to protect itself from morally corruptive films. After all, we are dealing only with a question of remedy—there is no question as to the evil which is the subject of the remedy. Not even the injunctive process, already recognized as constitutionally permissible against obscene *books,* is adequate unless the theory is to be that the public morality may be corrupted from the first showing of the film until it is detected and finally enjoined. We can take little consolation from whatever brevity there may be in such a period of time, notwithstanding the possibility of injunctions *pendente lite,* when one considers the saturation techniques employed by the motion picture industry which presents numerous showings at one and the same time, with several showings per day in each theatre. And beyond that, we take note of the possible multiplication of this mass presentation by means of television There can be little doubt that the only *effective* remedy which society possesses lies in a system of motion picture licensing which will operate adversely only to motion pictures which are corruptive of public morality. The substantive evil of the expression considered in light of the medium in issue make this a necessary and constitutional policy. To hold otherwise would be a "decision of desperation" (*Poulos* v. *New Hampshire,* 345 U. S. 395, 408)—a confession that our State is helpless to prevent the corruption of public morals, a duty which it

has assumed from time immemorial. We do not believe this is a confession which this court is required to make.

Analyzing this statute still further, we note that full judicial review under article 78 of the Civil Practice Act is available as a matter of right from any and every adverse determination by the Board of Regents (Education Law, §124). Fully appreciative of the preferred position of the constitutional guarantee of free expression, the courts of this State will always be alert to excesses and most quick to correct them, as indeed we were recently in the *Excelsior* case (*supra*). We note further that "* * * this sovereign State put the licensing power in one of its most powerful and most respected governmental bodies, the Board of Regents, a 'citizens' board' which is at the head of the State's educational system. Censorship in New York is, therefore, carried on at the highest levels of responsible State Government." (*Matter of Commercial Pictures Corp.* v. *Board of Regents*, 305 N. Y. 336, 350, *supra.*) Thus safeguarded, the operation of this statute is simply to protect the citizens of our State from motion pictures which alluringly portray acts of sexual immorality (here adultery) and recommend them as a proper way of life. No other remedy will accomplish this result. Considering all of the foregoing, our judgment is that this statute insofar as it is involved here survives the test of close analysis and pragmatic assessment laid down by the highest Federal tribunal in the *Kingsley* case (*supra*).

It is fundamental that each sovereign State has, under the Federal Constitution, the primary responsibility for the preservation of the basic morality of its people. Of course, it is equally fundamental that the State must discharge that responsibility without undue infringement upon individual liberty. But the distinction between liberty and license must be made. We fail to perceive what right is infringed here. The Constitution of the United States, "that great ordinance of government and *orderly liberty*", is invoked to protect the mass dissemination of approved sexual

immorality by adultery in motion pictures from the only effective remedy which society possesses. (See *Schaefer* v. *United States*, 251 U. S. 466, 477; italics supplied.) In the name of liberty we are requested to confer license to corrupt. "It would be a travesty on the constitutional privilege he invokes to assign him its protection." (*Gilbert* v. *Minnesota*, 254 U. S. 325, 333.)

Only the State, close to the problems of its people, can fully appreciate them. We are disturbed by the increasing marks of moral laxity. Sex crimes occur daily. Advertising appeals more and more to the sexual appetite. Sexual immorality and obscenity appear in books, pamphlets, voice recordings, motion pictures, photographs, prints, and in every other form which the imagination of those bent upon immorality and filth can devise. Sadly enough, we could go on. But this much is sufficient to demonstrate that our public morality, possibly more than ever before, needs every protection which government can give. We are unable to look upon moral disintegration as a mere change in custom. We reiterate that "[t]he destruction of morality renders the power of the government invalid, for government is no more than public order * * *." (*Commonwealth* v. *Sharpless*, *supra*, p. 103.)

There would seem to be little difficulty for most to accept sheer obscenity as a proper basis for motion picture censorship. However, to lay hold of obscenity as the *only* proper basis for motion picture censorship is to ignore substance in favor of form. As we noted earlier in discussing the question of clear and present danger, obscenity has been universally and traditionally rejected *because it is destructive of the public morality*. In view of this, it is curious indeed to say in one breath, as some do, that obscene motion pictures may be censored, and then in another breath that motion pictures which alluringly portray adultery as proper and desirable may not be censored. As stated above, "The law is concerned with effect, not merely with but one

means of producing it." It must be firmly borne in mind that to give obscenity, as defined, the stature of the only constitutional limitation is to extend an invitation to corrupt the public morals by methods of presentation which craft will insure do not fall squarely within the definition of that term. Precedent, just as sound principle, will not support a statement that motion pictures must be "out and out" obscene before they may be censored. *Roth* v. *United States* (354 U. S. 476, *supra*) did not involve motion pictures, much less their licensing. It merely held that obscenity is not protected speech and in the case of an obscene book it is not necessary to establish clear and present danger of substantive evil to the community. In sum, the Supreme Court has never outlined the substantive limits of motion picture censorship. To claim otherwise is to supplant reality with hope, and replace law with theory.

We refuse to be led away by alarmist cries that, if a license is refused under the circumstances disclosed by this record, the door is opened to unnecessary and unwarranted extensions of that remedy. The very test of necessity which we have utilized precludes that possibility. And we have already declared it to be our most solemn constitutional duty to " 'eschew the extremes and shun the extremists' ". (*Matter of Excelsior Pictures Corp.* v. *Regents*, *supra*, p. 246.) There is nothing extreme about refusing a license to films which alluringly portray act of sexual immorality by adultery as proper behavior. To withhold our approval from this amount of regulation would itself be an extreme. To those who fear possible unnecessary extensions of this remedy, we reply that this court is competent to define the permissible scope of motion picture licensing and to safeguard constitutional liberties.

It is not aside from the issue to ponder, for a moment, the fact that this State and this nation have always been dedicated to the observance of fundamental morality. Indeed, when we declared our independence from the yoke

of tyranny, we conceived that the unalienable liberties of men, one of which is free expression, are endowed "by their Creator". And in the same document, as they embarked upon the cause of freedom, its drawers expressed "a firm reliance on the protection of Divine Providence". After the cause was won, the Congress observed that "morality" is "necessary to good government". (Ordinance of 1787, art. III; McKinney's Cons. Laws of N. Y., Book 2, Constitution, pt. 2, p. 527). Lest anyone claim that almost two centuries have worked a contrary view in this nation, let him reflect upon the recent words of the United States Supreme Court: "We are a religious people whose institutions presuppose a Supreme Being." (*Zorach* v. *Clauson*, 343 U. S. 306, 313). And let him consider also the fact that the Pledge of Allegiance was recently altered so that it declares this nation to be one "under God." We can think of no greater national hypocrisy, or perversion of our Constitution, than to say that that document renders society impotent to adopt the only adequate remedy against motion pictures which are corruptive of the public morality. Indeed, it is necessary for our survival as a nation in an age of open conflict with atheistic materialism.

This case presents not only a question of law. It presents a matter of governmental conscience for which we are all responsible. We perceive no requirement in our Constitution that prohibits us from concluding as we have. If our people must be exposed to mass sexual immorality, if the very fabric of our society is to be laid bare to such corrosive influences, it must be at the command of our people themselves. Their command, however, has been to the contrary by virtue of this enactment. We think their decision is supported by their Constitution.

No other issues are raised which require discussion.

The order of the Appellate Division should be reversed, with costs in this court and in the Appellate Division, and the determination of the Board of Regents confirmed.

Appendix.

Concurring Opinion per Desmond, J.

DESMOND, J. (concurring). Appellants, the State Board of Regents, have banned the motion picture "Lady Chatterley's Lover" as being "immoral" within the special definition of that word in subdivision 1 of section 122-a of the Education Law, that is, as being a film "which portrays acts of sexual immorality * * * or lewdness" and which "presents such acts as desirable, acceptable or proper patterns of behavior". Since the theme and content of this film fairly deserve that characterization, the Regents acted within their express statutory powers in refusing to license it for exhibition. That, however, does not decide this lawsuit.

The question for decision is the one that has troubled our court and other State courts as well as the United States Supreme Court in a long series of litigations (from *Mutual Film Co.* v. *Ohio Ind. Comm.*, 236 U. S. 230 [1915], to *Times Film Corp.* v. *City of Chicago*, 355 U. S. 35 [1957]) involving State or municipal censorship of movies. Our problem is whether this statute insofar as it imposes prior restraint on the showing of this film in New York State offends against the free speech guarantee of the First and Fourteenth Amendments to the United States Constitution. In arriving at our answer we must perform a double duty. We must abide by the decisions of the supreme Federal judicial tribunal so far as pertinent and at the same time we must be reluctant to strike down a solemn legislative enactment on the ground of unconstitutionality, for that we may do "only as a last resort" (*Matter of Ahern* v. *South Buffalo Ry. Co.*, 303 N. Y. 545, 555). I am voting to reverse here and to uphold this denial of a license because this New York statutory definition of "immoral" carefully and quite recently devised by chapter 620 of the Laws of 1954 to meet constitutional objections (see *Matter of Commercial Pictures Corp.* v. *Board of Regents*, 305 N. Y. 336, revd. 346 U. S. 587) to the use of such wide or vague

terms as "immoral" and "tend to corrupt morals", is not patently unconstitutional. Furthermore, neither it nor any other State statute closely resembling it has been held invalid by the Supreme Court.

Of course if we had here (as in *Brown* v. *Kingsley Books*, 1 N. Y. 2d 177, affd. 354 U. S. 436) a case of hard core out-and-out pornography, our task would be simple enough. In *Joseph Burstyn, Inc.*, v. *Wilson* (343 U. S. 495, 502) the Supreme Court rejected the absolutist idea that "The Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places". And, more specifically, in *Roth* v. *United States* (354 U. S. 476—a criminal prosecution) the court flatly announced that "obscenity is not within the area of constitutionally protected speech" (p. 485, and see our similar holding in *Matter of Excelsior Pictures Corp.* v. *Regents*, 3 N. Y. 2d 237). "Obscene material", the Supreme Court told us in *Roth* (*supra*, p. 487), is "material which deals with sex in a manner appealing to prurient interest". But "prurient interest" is subjective and various. The movie we are here dealing with, while it has for its main or only theme illicit sexual congress, is a film version of a novel of great fame by an eminent author and, says the Supreme Court, "The portrayal of sex, *e.g.*, in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional freedom of speech and press" (*Roth* opinion, p. 487). The old *Hicklin* (*Regina* v. *Hicklin*, L. R. 3 Q. B. 360) test which examined into the publication's effect on "particularly susceptible persons" has been finally rejected (*Roth* opinion, p. 489). Now given the Supreme Court's approval is this test for obscenity: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest" (*Roth* opinion, p. 489). That criterion is roughly the same as the one presented in *Butler* v. *Michigan* (352 U. S. 380, 382), that is, the influence of the product on a normal adult. I confess my own

inability to determine whether or not an average person, applying to "Lady Chatterley's Lover" the undiscoverable standards of a hypothetical community would consider that the dominant theme of the whole film appealed principally to prurient interest or to artistic sensibilities or to a mature and adult interest in one of the lively arts. But one sure result of the *Roth* decision was to disappoint both the extreme liberals who had hoped to spread the First Amendment's blanket over all speech whether obscene or not, and the extremists at the other end who despite the pluralist character of our society would make of the law a policeman enforcing their own ideas of morality and propriety.

Helpful as are the *Roth* decision's explanations of the constitutional limits of speech and press freedom (and see, also, *Alberts* v. *California*, 354 U. S. 476, and *Kingsley Books* v. *Brown*, 354 U. S. 436, decided by the court on the same day), there are still large areas of uncertainty. The publications which were the subject matter of *Roth*, *Alberts* and *Kingsley* were actually pornographic and salacious, utterly lacking in "social importance" or value (*Roth* opinion, p. 484). So the Supreme Court was really passing only on the general constitutionality of State action against obscenity without finding it necessary to set down precise criteria for deciding whether a particular book or picture is obscene. It still remains true that the highest Federal court has never yet upheld any single instance of administrative censorship of a motion picture.

In the *Excelsior Pictures* case (3 N. Y. 2d 237, *supra*) our own court overruled the Regents' restraint of a nudist movie since the majority of this court considered the picture innocent and innocuous, merely unconventional in that it pictured activities of unclothed family groups in a secluded camp. In January of this year (*Sunshine Book* v. *Summerfield*, 355 U. S. 372) the Supreme Court, with no explanation beyond a reference to the *Roth* case (*supra*), held invalid the exclusion from the mails of a nudist maga-

zine (also a magazine dealing with homosexuality—*One, Inc.*, v. *Olesen*, 355 U. S. 371). Presumably, the court having looked at those books simply held them not to be obscene. A few months earlier the court in *Times Film Corp.* v. *City of Chicago* (355 U. S. 35, *supra*) reversed a ban by the Chicago authorities on the French moving picture "Game of Love". That picture was from all accounts sexy in the extreme (see descriptions in the lower court opinions at 139 F. Supp. 837 and 244 F. 2d 432) and it had been denied exhibition under an ordinance condemning movies "immoral or obscene".

All this recent history suggests that the Supreme Court will insist that censorship for obscenity be "closely confined" (*Kingsley Books* v. *Brown*, 354 U. S. 436, 441, *supra*) especially as applied to works of any literary or dramatic merit or expressing "ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion" (*Roth* opinion, p. 484, *supra*). Similarly, our own State Constitution says that: "every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right". But we are still left with our own stern duty of upholding, if we can on reason and authority, our own State's statute.

It is of no great importance that the Regents in denying a license here did not use the word "obscene" nor is it necessarily determinative that this film is not obscene in the dictionary sense of being lewd, disgusting or loathsome or dealing directly and foully with the excretory or sexual organs or functions. Our question is whether New York State may constitutionally refuse exhibition to a film because its subject matter is adultery presented as being right and desirable for certain people under certain circumstances. I confess doubt as to the validity of such a statute but I do not know how that doubt can be resolved unless we reverse here and let the Supreme Court have the final say. Unquestionably, this motion picture would

be considered obscene by many not illiberal moralists as objectively evidencing an intent by the author to arouse the viewer by emphasizing the sexually exciting elements of the story, a concept of obscenity not unlike the classic definition in *United States* v. *One Book Called "Ulysses"* (5 F. Supp. 182, 184; see my article, "Legal Problems Involved in Censoring the Media of Mass Communication", in 40 Marquette L. Re. 38, 55-56).

It still remains that the States have large remaining powers to apply reasonably related remedies to domestic evils (see *Butler* v. *Michigan*, 352 U. S. 380, 383, *supra*). The problem is not one of precise definition of "prior restraint" or "obscenity" or other word or phrase. A leading authority on legislation says that "the question should be not one of standards but rather whether censorship should be permitted in the particular case regardless of the wording" ("Control of Objectionable Publications—A Drafting Problem", 44 A. B. A. J. 175). To be examined is "the operation and effect of the statute in substance" (*Near* v. *Minnesota*, 283 U. S. 697, 713; *Kingsley Books* v. *Brown*, 354 U. S. 436, 441, *supra*). The "operation and effect" of subdivision 1 of section 122-a of our Education Law in this instance has been to keep from the screen a motion picture the theme of which is adultery, alluringly and approvingly depicted. Until the highest national tribunal says otherwise, we should let our statute so operate.

The order should be reversed, with costs in this court and in the Appellate Division, and the determination of the Board of Regents confirmed.

Dissenting Opinion per Dye, J.

Dye, J. (dissenting). When sections 122 and 122-a of the Education Law are read in the light of recent decisions dealing with administrative censorship of motion picture film, it seems clear that the learned Appellate Division, Third Department, quite properly annulled the determina-

tion of the Board of Regents and directed that a license issue for the showing of the motion picture entitled "Lady Chatterley's Lover".

As the record indicates, the Regents sitting as a Board of Review of its Division of Motion Pictures (an administrative agency empowered to censor motion picture film in advance of public showing, Education Law, §§122-132) affirmed a denial of the petitioner's application for a license to exhibit the film in question —*not conditionally*, unless certain designated sequences were deleted, as directed by the acting director of the Motion Picture Division, but *absolutely* and *finally* in language reflecting the vague generality of the statute, viz., that "the said film is 'immoral' within the meaning of the provisions of Sections 122 and 122-a of the Education Law" (Journal of Regents meeting, Sept. 28, 1956).

The correctness of that ruling, which a bare majority of this court is about to approve, depends in the final analysis solely on whether the enforcement of sections 122 and 122-a (subd. 1) satisfies constitutional due process.

When the Regents relied on the term "immoral" and the phrase "tend to corrupt morals", as used in section 122, as authority for banning the motion picture film *La Ronde*, the Supreme Court reversed, without opinion (*Matter of Commercial Pictures Corp.* v. *Board of Regents*, 305 N. Y. 336, revd. 346 U. S. 587), at the same time it decided *Superior Films* v. *Department of Educ. of Ohio* (346 U. S. 587), both on authority of *Joseph Burstyn, Inc.*, v. *Wilson* (343 U. S. 495) which had sustained a prior attack on section 122 as being too vague and indefinite to satisfy constitutional safeguards by providing essential criteria and standards for the guidance of administrative discretion. To meet the consequential effect of that adverse ruling section 122-a of the Education Law (L. 1954, ch. 620) was enacted in an effort to more precisely define the term "immoral" and the phrase "tend to corrupt morals" as used in section 122 for the purpose of censorship as

denoting "a motion picture film or part thereof, the dominant purpose or effect of which is *erotic* or *pornographic* or which portrays *acts of sexual immorality, perversion*, or *lewdness*, or which expressly or impliedly presents such acts as desirable, acceptable or proper patterns of behavior" (Education Law, §122-a, subd. 1; emphasis supplied).

However well intentioned, the language as used still falls short of providing fundamental standards deemed essential for the guidance of administrative discretion. The added words are no more meaningful than the term "sacrilegious", "immoral", "tend to incite to crime", "prejudicial to the best interests", "harmful and indecent", all found too general and unprecise to meet constitutional standards (*Joseph Burstyn, Inc.*, v. *Wilson, supra; Matter of Commercial Pictures* v. *Board of Regents, supra; Winters* v. *New York*, 333 U. S. 507; *Gelling* v. *Texas*, 343 U. S. 960; *Superior Films* v. *Department of Educ. of Ohio*, 346 U. S. 587, *supra; Matter of Excelsior Pictures Corp.* v. *Regents*, 3 N. Y. 2d 237; *Holmby Prods.* v. *Vaughn*, 350 U. S. 870; *Hallmark Prods.* v. *Carroll*, 384 Pa. 348). The term "immoral" as used in section 122 has not been clarified by the amendment. It is still vague and indefinite. When the censor relies on the term "immoral" as a basis for prior restraint, he necessarily must resort to his own notion of its meaning since the statute itself provides no test or standards to guide him in the exercise of his discretion. As the learned Justice, writing for the court below, succinctly pointed out: "A statute which leaves any field open to the opinion, discretion or individual point of view of a censor in barring a moving picture violates the Fourteenth Amendment".

No one contends that the film in question is obscene within the narrow legal limits of obscenity as recently defined by the Supreme Court in the application of which that court has said it is vital "that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner

appealing to prurient interest" (*Roth* v. *United States*, 354 U. S. 476, 488; *Matter of Excelsior Pictures Corp.* v. *Regents*, 3 N. Y. 2d 237, *supra*; *Holmby Prods.* v. *Vaughn*, 350 U. S. 870, *supra*). This film is not being banned because of the manner in which the sequences are produced or because of any existing clear and present danger—elements which must be proven before prior restraint or subsequent punishment may be justified (*Dennis* v. *United States*, 341 U. S. 494; *Marsh* v. *Alabama*, 326 U. S. 501; *Thomas* v. *Collins*, 323 U. S. 516; *Thornhill* v. *Alabama*, 310 U. S. 88; *De Jonge* v. *Oregon*, 299 U. S. 353; *Stromberg* v. *California*, 283 U. S. 359). The Regents have banned a showing of this film in its entirety because, in their opinion, its theme is *contra bonos mores*, and this in the face of the circumstance, that the book, on which it is based, has long been published and circulated freely without benefit of administrative censorship. This they may not do. Since *Burstyn* and *Commercial Pictures (supra)*, the essential particulars of section 122 have been deemed too vague and too indefinite to satisfy fundamental essentials of statutory validity, and these deficiencies have not been cured or supplied by anything contained in subdivision 1 of section 122-a. As I read it, the statute, as amended, continues to impinge on the constitutional guarantee afforded free speech and communication by the First and Fourteenth Amendments to the Federal Constitution.

A motion picture film should not be singled out as a subject for prior restraint under the beneficient guise of regulating community mores, any more than the prior censorship of press, books, the theatre or other media of communication which, as we know, includes a motion picture. Censorship under such guise is a type of paternalism that lends itself to the whim and caprice of the administrator. Whenever tested, censorship of motion picture film in advance has been disapproved. All but six States in the Union either do not have any film censorship in advance or have discontinued such practice. It should be noted that

discontinuance of administrative censorship of motion picture film in advance is not likely to create a vacuum for carte blanche exhibition of indecent films, so long as we have on our statute books appropriate penal laws to deal with the suppression of legally offensive motion picture film and the punishment of its exhibitors (cf. Penal Law, §§1141, 1141-a; Code Crim. Pro., §22-a; *Brown* v. *Kingsley Books*, 1 N. Y. 2d 177, affd. 354 U. S. 436).

For these reasons and for the reasons so well stated by Judge FULD with which I agree, I vote to affirm the judgment appealed from, with costs.

Dissenting Opinion per Fuld, J.

FULD, J. (dissenting). In my opinion, an affirmance is compelled not only on the ground that the term, "immoral," as defined in the Education Law, lacks that precision of meaning demanded by the Due Process Clause (see, e.g., *Commercial Pictures Corp.* v. *Regents*, 346 U. S. 587, revg. 305 N. Y. 336; *Times Film Corp.* v. *City of Chicago*, 355 U. S. 35, revg. 244 F. 2d 432), but also for the reason that the film, "Lady Chatterley's Lover"—based on "a novel of great fame by an eminent author" (per DESMOND, J. concurring, p. 367)—is not of a character which the First Amendment permits a state to exclude from public view. I agree, therefore, with what Judge DYE has said, but I would add these further thoughts on the more basic issue presented.

I cannot accept the premise underlying the opinions written for reversal on behalf of the majority, in other respects conflicting, that there is no meaningful distinction, so far as the doctrine of prior restraint is concerned, between a case involving post-publication prosecution and one involving prior administrative censorship. As I read the cases decided by the Supreme Court of the United States, legislation aimed at preventing the exhibition of moving pictures without advance approval by an admin-

istrative body, constituting as it does the clearest sort of previous restraint, is to be sharply differentiated from a statute providing for prosecution after publication. (Compare *Roth* v. *United States*, 354 U. S. 476 [per BRENNAN, J.], pp. 494-495 [per WARREN, Ch. J., concurring], with *Joseph Burstyn, Inc.*, v. *Wilson*, 343 U. S. 495; *Holmby Prods.* v. *Vaughn*, 350 U. S. 870; *Times Film Corp.* v. *City of Chicago*, 355 U. S. 35, *supra*.)

In reaching the conclusion that a system of prior administrative censorship is unconstitutional, I have in mind that even the limited injunctive process, with provision for prompt trial by the court, was recently regarded by four justices of the Supreme Court as an impermissible prior restraint. (See *Kingsley Books* v. *Brown*, 354 U. S. 436, 445-447.) Indeed, the majority of the court as well, after noting that " 'the protection • • • as to previous restraint is not absolutely unlimited' ", went on, significantly, to say, "the limitation is the exception; it is to be closely confined so as to preclude what may fairly be deemed licensing or censorship" (354 U. S., at p. 441). The latter is precisely what is here involved and the fact that a social problem is presented, which calls for solution, does not justify resort to unconstitutional means. As Chief Justice WARREN wrote, in the course of his concurring opinion in *Roth* v. *United States* (354 U. S. 476, 495, *supra*), "To recognize the existence of a problem, however, does not require that we sustain any and all measures adopted to meet that problem."

Were we dealing with newspapers or books or with a stage play, there could be no question as to the unconstitutionality of the statute under consideration, and I perceive no basis for distinguishing between such forms of expression and a moving picture. The Constitution protects all expression and is limited neither by the thoughts put forth nor by the medium employed. It protects the transmission of ideas and beliefs, whether orthodox or unorthodox, popular or unpopular, and its protection extends alike to words uttered in the street, a public hall or a theatre (with actors

live or on a screen) and to words written in newspapers, books or motion picture subtitles. A belief does not lose its character as a belief, an idea does not become less of an idea, because, instead of being expressed by the airborne voice, the printed word or the still picture, it is put forward by a moving picture with a sound track. The First Amendment does not inquire whether the medium is visual, acoustic, electronic or one yet to be devised, nor does it seek to know the speed of dissemination or the size of the audience. In short, the Amendment's meaning and vitality may not be conditioned upon the mechanism involved, and the differences existing between a book and a moving picture do not support a holding that the freedom of expression assured by the Constitution is inapplicable to the moving picture.

I would, therefore, affirm the Appellate Division's order.

Dissenting Opinion per Van Voorhis, J.

Van Voorhis, J. (dissenting). I agree with the Appellate Division and with my dissenting brethren that section 122-a of the Education Law is unconstitutional, in which event this problem play cannot be suppressed as "immoral". On the other hand, it would have been within the jurisdiction of the Regents (it seems to me) to have eliminated several passages in this picture as "obscene" under section 122. The Motion Picture Division of the Education Department attempted something of that sort in recommending that certain scenes be expurgated, but on the ground that they are "immoral". Although that ground is not available, and it is impossible to write off this entire drama as "mere pornography" (*Roth* v. *United States*, 354 U. S. 476), certain passages might have been eliminated as "obscene" without doing violence to constitutional liberties. In their endeavor to censor morality, both the Motion Picture Division and the Regents seem to have overlooked their power

to exclude "obscenity", which includes the portrayal on the public screen of sexual intimacies whether they be marital or extramarital. Thus, while concurring with the dissenting Judges to affirm the unconstitutionality of section 122-a, I would remit the matter to the Board of Regents to consider the aspect which I have mentioned before ordering them to issue a license for the exhibition of this picture without any expurgations.

Judges FROESSEL and BURKE concur with Chief Judge CONWAY; Judge DESMOND concurs in result in a separate opinion; Judges DYE and FULD dissent and vote to affirm, each in a separate opinion in which the other concurs and in both of which dissenting opinions Judge VAN VOORHIS concurs in part in a separate dissenting opinion for remission of the matter to the Board of Regents.

Order reversed, etc.

Appendix.

Order Appealed From.

COURT OF APPEALS

STATE OF NEW YORK, ss.:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 15th day of May in the year of our Lord one thousand nine hundred and fifty-eight, before the Judges of said Court.

WITNESS,

The Hon. ALBERT CONWAY, Chief Judge, Presiding.
RAYMOND J. CANNON, Clerk.

REMITTITUR—May 15, 1958.

IN THE MATTER

of

The Application of KINGSLEY INTERNATIONAL PICTURES CORPORATION,
Respondent,

For an Order &c.,

vs.

THE REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,
Appellants.

BE IT REMEMBERED, That on the 8th day of November in the year of our Lord one thousand nine hundred and fifty-seven, The Regents of the University of the State of New York, the appellants in this cause, came here unto the Court of Appeals, by Charles A. Brind, Jr., and Louis J.

Lefkowitz, Attorney General, their attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And Kingsley International Pictures Corporation, the respondent in said cause, afterwards appeared in said Court of Appeals by London, Simpson & London, its attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Charles A. Brind, Jr., and Mrs. Ruth Kessler Toch, of counsel for the appellants, and by Mr. Ephraim S. London, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is reversed, with costs in this Court and in the Appellate Division, and the determination of the Board of Regents confirmed.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said order be reversed, with costs &c., as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgement of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be

enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
ALBANY, MAY 15, 1958.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

SEAL.

RAYMOND J. CANNON
Clerk.

Appendix.

The Statutes Involved.

Education Law—Article 3.

PART II—MOTION PICTURE DIVISION

§120. Motion picture division continued; organization.

There shall continue to be in the education department a motion picture division. The head of such division shall be a director, who shall be appointed by the regents, upon the recommendation of the commissioner of education. The regents may consolidate such division with the division of visual instruction or may assign to the motion picture division the functions, powers and duties of other divisions, bureaus or officers in the department. The board of regents, upon the recommendation of the commissioner of education, shall appoint such officers and employees as may be needed and prescribe the powers and duties and, within the limits of the appropriations made therefor, fix the compensation of such director, officers and employees. All expenses actually and necessarily incurred in the performance of their duties shall be allowed to such director, officers and employees.

§121. Local offices and bureaus.

The regents may authorize the establishment and maintenance of offices and bureaus for the reception and examination of films and for the transaction of the business of the division in such places as efficiency, economy and the public interests require.

§122. Licenses.

The director of the division or, when authorized by the regents, the officers of a local office or bureau shall cause to be promptly examined every motion picture film submitted to them as herein required, and unless such film or a part

thereof is obscene, indecent, immoral, inhuman, sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime, shall issue a license therefor. If such director or, when so authorized, such officer shall not license any film submitted, he shall furnish to the applicant therefor a written report of the reasons for his refusal and a description of each rejected part of a film not rejected in toto.

§122-a. Definitions.

1. For the purpose of section one hundred twenty-two of this chapter, the term "immoral" and the phrase "of such a character that its exhibition would tend to corrupt morals" shall denote a motion picture film or part thereof, the dominant purpose or effect of which is erotic or pornographic; or which portrays acts of sexual immorality, perversion, or lewdness, or which expressly or impliedly presents such acts as desirable, acceptable or proper patterns of behavior.

2. For the purpose of section one hundred twenty-two of this chapter, the term "incite to crime" shall denote a motion picture the dominant purpose or effect of which is to suggest that the commission of criminal acts or contempt for law is profitable, desirable, acceptable, or respectable behavior; or which advocates or teaches the use of, or the methods of use of, narcotics or habit-forming drugs.

§123. Permits.

1. "Current event" films. All films exclusively portraying current events or pictorial news of the day, commonly called news reels, or excerpts from the public press, may be exhibited without inspection and no permits or fees shall be required therefor.

§ 2. Scientific and educational films. Such director or, when authorized, such officer shall issue a permit for every

[1] So in original. Section symbol probably should be omitted.

motion picture film of a strictly scientific character intended for use by the learned professions, without examination thereof, provided that the owner thereof, either personally or by his duly authorized attorney or representative, shall file the prescribed application which shall include a sworn description of the film and a statement that the film is not to be exhibited at any private or public place of amusement.

3. Such director or, when so authorized, such officer may, in his discretion, without examination thereof, issue a permit for any motion picture film intended solely for the educational, charitable or religious purposes, or by any employer for the instruction or welfare of his employees, provided that the owner thereof, either personally or by his duly authorized attorney or representative, shall file the prescribed application, which shall include a sworn description of the film. No fee shall be charged for any such permit.

§124. Review by regents.

An applicant for a license or permit, in case his application be denied by the director of the division or by the officer authorized to issue the same, shall have the right of review by the regents. The regents, however, by rule may provide that such reviews may be heard and determined by a committee of the regents, the commissioner of education, the deputy commissioner of education or an assistant commissioner of education. A determination upon such review refusing a license shall be reviewable by a proceeding under article seventy-eight of the civil practice act[1] at the instance of the applicant.

§125. Permits revocable.

Any permit issued as provided in part two of this article or as provided in chapter seven hundred fifteen of the laws of nineteen hundred twenty-one may be revoked by such

[1] See Civil Practice Act, §1283, et seq.

director or officer authorized to issue the same five days after notice in writing is mailed to the applicant at the address named in the application. Thereafter any such film may be submitted to such director or authorized officer only in the manner provided for license.

§126. Fees.

The director or authorized officer of such division shall collect from each applicant for a license or a permit, except as otherwise expressly provided in part two of this article, a fee of three dollars for each one thousand feet or fraction thereof of original film and two dollars for each additional copy thereof licensed or permitted by him. The revocation or cancellation of any license or permit issued shall not entitle the grantee thereof to the return of any fee paid. All fees received by such director or authorized officer shall be paid monthly into the general fund of the treasury of the state of New York.

§127. Applications.

No license or permit shall be issued for any film unless and until application therefor shall be made in writing in the form, manner and substance prescribed by the education department, and accompanied by the required fee. Such application shall immediately be given a serial number which shall by the producer, owner or applicant be made a permanent part of the principal title portion of the corresponding film and every copy thereof for which the permit or license is applied, in such style and substance as such department shall prescribe.

§128. Licenses and permits void.

Any license or permit issued upon a false or misleading affidavit or application shall be wholly void ab initio. Any change or alteration in a film after license or permit, except the elimination of a part or except upon written direction of the director or authorized officer of such division, shall

be a violation of this article and shall also make immediately void the license or permit therefor. A conviction for a crime committed by the exhibition or unlawful possession of any film in the state of New York shall per se revoke any outstanding license or permit for said film and such director or authorized officer shall cause notice thereof to be sent to the applicant or applicants.

§129. Unlawful use or exhibition.

It shall be unlawful to exhibit, or to sell, lease or lend for exhibition at any place of amusement for pay or in connection with any business in the state of New York, any motion picture film or reel, other than those specified in subdivision one of section one hundred twenty-three, unless there is at the time in full force and effect a valid license or permit therefor of the education department and unless such film or reel shall contain for exhibition upon the screen identification matter in the substance, style and length which such department shall prescribe.

This section shall not be construed to prohibit the making of an executory contract for the sale or leasing of a film or films, provided the film shall have been licensed under the provisions of part two of this article and the license seal attached at the time of delivery.

§130. Posters, banners, et cetera.

No person or corporation shall exhibit or offer to another for exhibition purposes any poster, banner or other similar advertising matter in connection with any motion picture film, which poster, banner or matter is obscene, indecent, immoral, inhuman, sacrilegious or of such a character that its exhibition would tend to corrupt morals or incite to crime. If such poster, banner or similar advertising matter is so exhibited or offered to another for exhibition, it shall be sufficient ground for the revocation of any permit or license issued by the education department.

§131. Penalty.

A violation of any provision of part two of this article shall be a misdemeanor.

§132. Enforcement; rules and regulations.

The board of regents shall have authority to enforce the provisions and purposes of part two of this article; but this shall not be construed to relieve any state or local peace office in the state from the duty otherwise imposed of detecting and prosecuting violations of the laws of the state of New York. In carrying out and enforcing the purposes of part two of this article, the regents may make all needful rules and regulations.

ILE COPY

Clerk, Supreme Court, U.S.
FILED
OCT 23 1958
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 394

In the Matter of the Application
of
KINGSLEY INTERNATIONAL PICTURES
CORPORATION,

Appellant,

For an Order Pursuant to Article 78 of the
Civil Practice Act

against

THE REGENTS OF THE UNIVERSITY OF THE
STATE OF NEW YORK,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE
STATE OF NEW YORK.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

The appellees in the above entitled cause make this statement in opposition to appellant's statement as to jurisdiction herein, and further move to dismiss the appeal herein and to affirm:

I. Statement of Issue on Appeal.

The question sought to be presented in this appeal is appellant's claim that Sections 120 to and including 132 of the Education Law of the State of New York, providing

for the examination and licensing of motion picture films exhibited for profit, and for penalties in event of unlicensed exhibitions, violate the First and Fourteenth Amendments of the Constitution of the United States as constituting an unauthorized restraint of freedom of speech or of expression; that the term of the statute "immoral" is so vague and indefinite as to be unconstitutional.

These claims the appellees deny and the Court of Appeals of the State of New York in the opinion and order here challenged, determined the questions adversely to appellant.

The Court of Appeals, affirming the denial of a license to the film "Lady Chatterley's Lover", found that:

> "This denial was based upon sections 122 and 122-a of the Education Law which *require* the denial of a license to motion pictures which are immoral in that they '*portray* acts of sexual immorality * * * as desirable, acceptable or proper patterns of behavior'."

There is no doubt about the purpose for which these sections have been enacted by the Legislature. A society may properly seek to protect itself against the harmful effects of such films; it may reject them.

The Court further declared:

> "The vileness of the matter it seeks to reject is clear. It embraces not only films which are [illegible]ly suggestive and obscene, nor only those which are sexually suggestive and immoral in theme, but those which combine the two. The statutory rejection is aimed at those films which, not being satisfied with portraying scenes of rank obscenity, go further and recommend sexually immoral acts, thus portrayed in a manner appealing to the prurient interest, as proper conduct for the people of our State."

The Court of Appeals further found that "the standard [of immorality] under consideration here is as explicit and restrictive in its terms as words permit."

> "*We do not believe that a film which is rank pornography is objectionable simply because it excites a human appetite. Rather, the objection lies in the corrosive effect upon the public sense of sexual morality.* The principle which has always prompted the rejection of obscenity is the 'social interest in order and morality'. (*Chaplinsky* v. *New Hampshire*, 315 U. S. 566, 571-572, *supra; Beauharnais* v. *Illinois*, 343 U. S. 250, 256, 257, *supra.*)"

Such a film which flouts the basic principles of morality is not protected by the First Amendment.

II. Pertinent Statutes.

Education Law, Sections 122 and 122-a.

§ 122. Licenses

> "The director of the division or, when authorized by the regents, the officers of a local office or bureau shall cause to be promptly examined every motion picture film submitted to them as herein required, and unless such film or a part thereof is obscene, indecent, immoral, inhuman, sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime, shall issue a license therefor. If such director or, when so authorized, such officer shall not license any film submitted, he shall furnish to the applicant therefor a written report of the reasons for his refusal and a description of each rejected part of a film not rejected *in toto*."

§ 122-a. Definitions

> "1. For the purpose of section one hundred twenty-two of this chapter, the term 'immoral' and the phrase 'of such a character that its exhibition would tend to

corrupt morals' shall denote a motion picture film or part thereof, the dominant purpose or effect of which is erotic or pornographic; or which portrays acts of sexual immorality, perversion, or lewdness, or which expressly or impliedly presents such acts as desirable, acceptable or proper patterns of behavior. * * *"

See also Sections 129 and 131.

Section 122-a was enacted in *1954*. At the time of approving the amendment (Ch. 620, L. 1954) Governor Dewey wrote in part as follows:

"* * * Recent Supreme Court decisions have indicated that the term 'immoral' may not be sufficiently definite for constitutional purposes. The primary purpose of this bill is to define 'immoral' and 'tend to corrupt morals' in conformance with the apparent requirements of these cases. It does so by defining them in terms of 'sexual immorality.' The words selected for this definition are based on judicial opinions which have given exhaustive and reasoned treatment to the subject. * * *

"The language of the Supreme Court of the United States, in a recent opinion of this precise problem, should be noted: 'To hold that liberty of expression by means of motion pictures is guaranteed by the First and Fourteenth Amendments, however, is not the end of our problem. *It does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places.*' [Burstyn v. Wilson, 72 S. Ct. 777, 343 U. S. 495, at 502, 96 L. Ed. 1098.] So long as the State has the responsibility for interdicting motion pictures which transgress the bounds of decency, we have the responsibility of furnishing guide lines to the agency charged with enforcing the law. * * *" (Emphasis supplied)

III. The Story of the Film and History of Proceeding With Respect Thereto.

The major characters in the film "Lady Chatterley's Lover" are Lady Chatterley, her husband Sir Clifford Chatterley, who is crippled, her lover, Mellors, a gamekeeper of their estate, the wife of Mellors and the wife's lover. The story presents in great detail the love affair of Lady Chatterley and Mellors which occurs subsequent to but apparently not in compliance with Sir Clifford Chatterley's suggestion to her that in view of his war injury which left him impotent, she have a child by another man to provide him with an heir to his title and estate. As a result of the affair, Lady Chatterley becomes pregnant with Mellors' child and in the final scenes leaves her husband to join Mellors. There are several scenes of love making between Lady Chatterley and Mellors and between Mellors' wife and another man which are patently pornographic, immoral and obscene.

When the film was originally presented to the Motion Picture Division, the Division, after review, directed the elimination of three scenes as follows:

> "Reel 2D—Eliminate all views of Mellors and Lady Chatterley in cabin from point where they are seen lying on cot together, in a state of undress to end of sequence."
>
> "Reel 3D—Eliminate all views of Mellors caressing Lady Chatterley's buttock and all views of him unzipping her dress and caressing her bare back. Eliminate following spoken dialogue accompanying these actions:

'Mais tu es nue * * *	'But you're nude * * * you're
Tue es nue sous ta robe,	nude under your * * * dress,
et tu ne le disais pas	and you didn't say so * * *
Qu'est-ce que to as?'	What is it?' "

Eliminate accompanying English superimposed titles:

"'You have nothing on * * *'
'And you didn't say so * * *'
'What is it?'"

"REEL 4D—Eliminate entire sequence in Mellors' bedroom, showing Lady Chatterley and Mellors in bed, in a state of undress.

REASON: 'Immoral' within the intent of our law."

The petitioner appealed from the determination of the Division in this respect to the Regents. After review of the film by a Committee of the Board of Regents, the Committee rendered its opinion which held that the three sequences specifically referred to by the Division were immoral under Sections 122-122a and further, that the whole theme of the picture is immoral in that the theme is the presentation of adultery as a desirable, acceptable pattern of behavior and affirmed the determination of the Division.

The Board of Regents thereafter considered the recommendation of the Committee and voted that the determination denying the license for the motion picture be affirmed.

Thereafter, appellant instituted a proceeding in the courts. The Supreme Court of the State of New York, Appellate Division, Third Department annulled the determination of the Regents. The Court of Appeals of the State reversed and confirmed the decision of the Board of Regents.

IV. No New Federal Question is Presented by This Attempted Appeal.

This Court in its decisions relating to motion picture censorship, and in particular *Matter of Burstyn* v. *Wilson*, 343 U. S. 495, determined that certain language contained

in state statutes setting up a basis for censorship was too vague, viz., "sacrilegious" was too vague, "immoral" too vague, etc. See also *Commercial Pictures Corp.* v. *Regents*, 346 U. S. 587. Under these specific opinions the Court indicated that under a carefully drawn statute the State had the legal right to predetermine whether a motion picture satisfied the statute before licensing it.

Having this in mind, the Legislature of this State has recast the statute with respect to the definition of the word "immoral" in an attempt to clarify it. The express provisions of this new statute are set forth heretofore. The Regents have refused to license this picture on the ground that it is immoral on two specific points, viz., that certain scenes contained in the picture were clearly immoral and second that the whole theme of the picture is immoral in that adultery is presented as a desirable and acceptable pattern of behavior.

It is quite clear that the term "immoral" as used by them and by the Motion Picture Director which referred to "acts of sexual immorality, lewdness, etc.," as set forth in Section 122-a of the Education Law, would embrace within such use the term "obscenity." In other words, it is our position that this picture is obscene and that the Regents have so held. It is our position that the statute in referring to "*acts of sexual immorality*" is not so limited that it refers only to portrayal of the final act itself; that obscene (immoral) acts leading up to the same, come within the provisions of this statute and within the determination of this Court in exactly the same way as the final culmination of the act itself. There can be no doubt that these acts as portrayed come within that area. Not only are the acts involved obscene in themselves but they are immoral in that they occur between a married

woman and a man not her husband, and it is a fact which is not subject to any argument that the theme of the picture throughout presents the relationship between this man and the wife of another as, to quote the statutory language, "desirable, acceptable, proper patterns of behavior."

Under Section 122-a there is no longer room for the argument that the term "immoral" is too vague to present a valid standard. The Legislature has clearly said that when a film presents "adultery" (a well defined act) as desirable and acceptable it is immoral and should not be exhibited. The Legislature, acting within the scope of its power has thus sought to protect the body social from the clear and present danger of corruption by such exhibitions.

Appellant's characterization of the statutory language as "indefinite and vague" cannot make it so.

In this brief we have no intention of rehashing all the arguments which have been presented to this Court heretofore in dealing with motion picture censorship. There is no doubt that the Legislature in this State and the people of this State are for some type of pre-review of motion pictures in order that the vicious ones can be eliminated. In this particular case the Legislature by unanimous vote of everybody has declared that immoral pictures which the Legislature has attempted to define as immoral should not be licensed. So far as this particular picture is concerned we know of no clearer language which can be used than that upon which the Regents have based their decision. Certainly the picture depicts the course of conduct proscribed by the statute, certainly the picture depicts sexual relations which the statute decries.

The Courts of this State have reviewed the film and have found that it comes squarely within the condemnation of

the statute. It is not our understanding that such facts will be reviewed by this Court. The only remaining question is whether "freedom of speech" guarantees the right to exhibit such a film in defiance of the State statute.

As I have pointed out in earlier briefs, an attempt was made to repeal the motion picture law, itself, some years ago and every educational organization, church organization, public spirited organizations, such as the League of Women Voters, opposed the repeal. We believe under all the circumstances that the Courts should join with the Regents in discovering sound basis to uphold the act of the Legislature. While in every motion picture case which has come before this Court, the Court has been importuned to hold precensorship illegal, this Court has refused so to do. The law of the case, as we understand it, is that a properly drawn statute setting forth the standards which are understood by everybody is constitutional and that this Court has definitely so indicated. In any event, as far as this case is concerned, we have obscenity in the picture as well as the other standards coming under the term "immoral" as defined by the Legislature.

The Supreme Court of the United States in *Swearingen* v. *United States*, 161 U. S. 446, 451 said:

> "The words 'obscene,' 'lewd,' and 'lascivious,' as used in the statute, * * * signify *that form of immorality which has relation to sexual impurity*, and have the same meaning as is given them at common law in prosecutions for obscene libel. * * * [To fall into this category the subject matter must be] * * * of a lewd, lascivious and obscene tendency, calculated to corrupt and debauch the mind and morals of those into whose hands it might fall." (Emphasis supplied.)

This Court has clearly indicated in recent decisions that society is not powerless to protect itself from the degrada-

tion of lewd publications. In *Kingsley Books, Inc.* v. *Brown*, 354 U. S. 436, 1 L. Ed. 2d 1469, 77 S. Ct. 1325, Mr. Justice Frankfurter said in the prevailing opinion (P. 440-441):

"* * * In an unbroken series of cases extending over a long stretch of this Court's history, it has been accepted as a postulate that 'the primary requirements of decency may be enforced against obscene publications.' Id. 283 U. S. at 716. And so our starting point is that New York can constitutionally convict appellants of keeping for sale the booklets incontestably found to be obscene. *Alberts* v. *California*, decided this day [1 L. ed. 2d 1498]. The immediate problem then is whether New York can adopt as an auxiliary means of dealing with such obscene merchandising the procedure of § 22-a. [New York Code of Criminal Procedure.]

"We need not linger over the suggestion that something can be drawn out of the Due Process Clause of the Fourteenth Amendment that restricts New York to the criminal process in seeking to protect its people against the dissemination of pornography. It is not for this Court thus to limit the State in resorting to various weapons in the armory of the law. * * * Just as *Near* v. *Minnesota*, 283 U. S. 697, 75 L. ed. 1357, 51 S. Ct. 625, *supra*, one of the landmark opinions in shaping the constitutional protection of freedom of speech and of the press, left no doubts that 'Liberty of speech, and of the press, is also not an absolute right,' 283 U. S. at 708, it likewise made clear that 'the protection even as to previous restraint is not absolutely unlimited.' Id. 283 U. S. at 716. To be sure, the limitation is the exception; it is to be closely confined so as to preclude what may fairly be deemed licensing or censorship.

"The judicial angle of vision in testing the validity of a statute like § 22-a is 'the operation and effect of the statute in substance.' Id. 283 U. S. at 713. The phrase 'prior restraint' is not a self-wielding sword. Nor can it serve as a talismanic test. The duty of closer analysis and critical judgment in applying the thought behind the phrase has thus been authoritatively put by one who brings weighty learning to his sup-

> port of constitutionally protected liberties: 'What is needed,' writes Professor Paul Freund, 'is a pragmatic assessment of its operation in the particular circumstances. The generalization that prior restraint is particularly obnoxious in civil liberties cases must yield to more particularistic analysis.' The Supreme Court and Civil Liberties, 4 Vand. L. Rev. 533, 539. * * *"

In *Roth* vs. *United States*, 354 U. S. 476, in upholding the power of the State to control obscenity, this Court pointed out that the erection of rigid definitions is an impossible task. Mr. Justice Brennan, when speaking for the Court in the *Roth Case*, said:

> "This Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process '[T]he Constitution does not require impossible standards'; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practice * * *'."

In the *Roth Case* (*Supra*), this Court established a criterion by which obscenity may be judged.

> "* * * Whether to the average person, applying contemporary community standards, *the dominant theme of the material taken* as a whole appeals to the prurient interest." (Emphasis added.)

This test, almost verbatim, is embodied in section 122-a of the New York Education Law, the constitutionality of which the appellant now attacks:

> § 122-a "* * * the term 'immoral' * * * shall denote a motion picture film or part thereof, *the dominant purpose or effect of which is erotic or pornographic* * * *." (Emphasis added.)

It cannot be argued that a statute which so clearly meets the test set forth by this Court, is unconstitutional. Such

a test "provides safeguards adequate to withstand the charge of constitutional infirmity". (*Roth Case, Supra.*)

This Court has recognized the power of the State by the exertion of its police power to suppress obscenity.

> "There are certain well defined and narrowly limited classes of speech *the prevention and punishment* of which *have never been thought* to raise any constitutional problem." [*Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571, 572, 86 L. Ed. 1031, 1035.]
>
> "In maintaining this guaranty [liberty of the press and speech], the authority of the State to enact laws to promote the health, safety, *morals* and general welfare of its people is necessarily admitted." (*Near* v. *Minnesota*, 283 U. S. 697, 707, 51 S. Ct. 625, 628) (Emphasis added.)

In upholding the constitutionality of the licensing statute, the New York Court of Appeals reaffirmed the State's "primary responsibility for the preservation of the basic morality of its people." The Court of Appeals refused "to confer a license to corrupt."

The basic morality of the people of this State is well known. The appellant had ample knowledge of the moral code which it seeks to ridicule and debase. Adultery is the sole ground for divorce in New York State [Civ. Prac. Act § 1147]; adultery is a crime in New York as in many states of the Union [Penal Law § 101]. As stated by Judge Conway in the opinion in the present case: "Indeed adultery has been decreed to be immoral since Moses received the Commandments on Mount Sinai."

CONCLUSION.

It is therefore submitted that, when analyzed, the questions which this Court is now being asked to review have all been heretofore determined; that there is no substantial constitutional question presented by this appeal entitling the appellant to invoke the jurisdiction of the Supreme Court of the United States. Wherefore appellees respectfully move that the within appeal be dismissed or that judgment be dismissed or that the judgment and decree of the Court of Appeals of the State of New York be affirmed.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1958.

No. 394.

IN THE MATTER

of

The Application of KINGSLEY INTERNATIONAL PICTURES CORPORATION,

Appellant,

For an Order Pursuant to Article 78 of the Civil Practice Act,

against

THE REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

1. The appellants have filed in this Court a document entitled "Statement Opposing Jurisdiction and Motion to Dismiss or Affirm".

In so far as the motion is to dismiss the appeal, it is necessarily based upon Rule 16(1)(a) of the Rules of this Court, which makes such a motion available when it is

contended "that the appeal is not within the jurisdiction of this court, because not taken in conformity to statute or to these rules".

No facts are, or could be, alleged by the Appellees which would bring this appeal within Rule 16(1)(a). Their entire argument is set forth in their Point IV (pp. 6-12), headed "No New Federal Question is Presented by This Attempted Appeal". No suggestion is made, there or elsewhere in the Appellees' Statement, that this appeal was not taken in meticulous conformity to statute and the rules of this Court.

The motion, in so far as it is a motion to dismiss, should accordingly be denied.

2. In so far as the motion is to affirm the judgment and decree below, it rests solely on the Appellees' contention that no *new* federal question is presented by this appeal. The Appellees' argument is completely groundless and unsound. Novelty has never been a requisite for the jurisdiction of this Court. The Court has never refused to proscribe the denial of a fundamental right merely because it had done so before. The argument is, moreover, factually incorrect. One of the major questions presented by this appeal has never before been considered by this Court and another, though it has been considered, is still undetermined.

The constitutionality of Section 122-a of the New York Education Law is drawn in question by this appeal. The statute is a recent enactment designed to circumvent the determination in *Commercial Pictures Corp.* v. *Regents*, 346 U. S. 587. The instant case is the first in which the validity of the law has been challenged.

Appellees' argument in their Statement to this Court is directly contrary to their position in the New York Court of

Appeals. There, seeking to engage the favorable attention of that Court in order to secure the reversal of a decision favorable to Appellant, Appellees opened their argument with the statement: "The problem presented in [sic] this picture is brand new."* Now the Appellees, hoping to insulate the favorable Court of Appeals decision from review, present the problem as so stale as to be unworthy of the Court's attention.

A separate major issue presented by this appeal is whether the entire statutory system of licensing moving pictures imposes an unconstitutional restraint on freedom of expression. This question, again, Appellees say is not "new", for the reason that: "While in every motion picture case which has come before this Court, the Court has been importuned to hold precensorship illegal, this Court has refused to do so" (Statement Opposing Jurisdiction, p. 9).

As pointed out in our Jurisdictional Statement (at p. 13), that issue was formulated in the *Burstyn* case, and the Court there indicated doubt with respect to the validity of the licensing system (*Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. at pp. 503-504). But the issue was specifically left unresolved because resolution was not essential to a determination of that appeal. In later appeals the Court similarly left the question open (see cases cited in our Jurisdictional Statement, p. 16). In that sense, but only in that sense, the Court has failed to hold the precensorship statutes unconstitutional. But it is unreasonable to construe the Court's reservation of the issue as an adverse disposition. That is particularly true in the light of the dictum

* Court of Appeals Brief, p. 6. The sentence was prefixed to a paragraph otherwise substantially the same as the opening paragraph of their argument here (Statement Opposing Jurisdiction, pp. 6-7).

in the *Burstyn* case to the effect that, in general, such prior restraints as are imposed by the statutes under consideration are "especially condemned", and that the State of New York shall have a "heavy burden" if it attempts to sustain the validity of the laws (*Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. at pp. 503-504).

3. At page 9 of their Statement Opposing Jurisdiction the Appellees refer to support allegedly given years ago to "the motion picture law, itself", by various organizations. Though the point is of only incidental significance, we deprecate this effort to impress the Court by invoking "facts" which have no basis whatever in the record.

Conclusion.

The motion to dismiss or affirm should be denied.

November 11, 1958.

Respectfully submitted,

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Clerk

Supreme Court of the United States

OCTOBER TERM, 1958

No. 394

KINGSLEY INTERNATIONAL PICTURES CORPORATION,

Appellant,

vs.

THE REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR APPELLANT

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Supreme Court of the United States

OCTOBER TERM, 1958

No. 394

KINGSLEY INTERNATIONAL PICTURES CORPORATION,
Appellant.

vs.

THE REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK.

BRIEF FOR APPELLANT

Opinions Below

The opinion of the Appellate Division (Third Department) of the Supreme Court of the State of New York is reported in 4 App. Div. 2d (N. Y.) 348, 165 N. Y. S. 2d 681 (R. 27-30).

The opinions of the Judges of the Court of Appeals of the State of New York are reported at 4 N. Y. 2d 349, 175 N. Y. S. 2d 39 (R. 30-55).

Statement of the Grounds of Jurisdiction

The jurisdiction of this Court is invoked under Title 28 of the United States Code, Section 1257(2).

The decree sought to be reviewed was made by the Court of Appeals of the State of New York on May 15, 1958, and judgment was entered thereon in the New York Supreme Court, Albany County, on July 2, 1958. The Notice of Appeal to the Supreme Court of the United States was filed

July 30, 1958 in the Supreme Court of the State of New York, Albany County.

Probable jurisdiction was noted November 24, 1958 (R. 62).

The Constitutional Provisions and Statutes Involved

The Constitution of the United States,

First Amendment:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Fourteenth Amendment:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Statutes Involved

New York Education Law §129 makes it unlawful to exhibit motion pictures in a public theater unless the pictures are licensed. Violation of the provision is a penal offense (Education Law §131). The required licenses are issued by the Motion Picture Division, a subdivision of the State Education Department (Education Law §§120, 122.)

Before a license is issued for a film, it must be reviewed by the Director or other officer of the Motion Picture Division. The reviewers are empowered and directed to deny a license to any film found "obscene, indecent, immoral, inhuman, sacrilegious, or * * * of such a character that its exhibition would tend to corrupt morals or incite to crime". (Education Law §122). Section 122-a of the Education Law provides that the term "immoral" as used in Education Law §122 refers to motion pictures or parts of motion pictures "the dominant purpose or effect of which is erotic or pornographic; or which portrays acts of sexual immorality, perversion, or lewdness, or which expressly or impliedly presents such acts as desirable, acceptable or proper patterns of behavior."

The texts of the statutes referred to and the volume and page where each may be found are set forth in the Appendix.

The Questions Presented for Review

(1) Whether Sections 122, 122-a, 126, 129 and 131 of the Education Law of the State of New York contravene the First and Fourteenth Amendments to the Constitution of the United States by setting up a system of licensing and prior censorship of motion pictures.

(2) Whether Sections 122 and 122-a.1 of the Education Law of the State of New York, in providing for suppression of films found to be immoral, authorize the suppression of opinion in violation of the rights guaranteed by the First and Fourteenth Amendments to the Constitution of the United States.

(3) Whether Sections 122 and 122-a.1 of the Education Law of the State of New York are so vague and indefinite

that their attempted enforcement violated Appellant's property rights and civil rights without due process of law.

(4) Whether the ban of the Appellant's moving picture "Lady Chatterley's Lover" was unwarranted and unreasonable and unjustly deprived Appellant of its property rights and right of communication.

Summary of Argument

I. The New York motion picture censorship laws require that all films be approved and licensed by a government agency before they may be shown in a public theater. The laws create a system of prior restraints. Such restraints are repugnant to the Constitutional amendments guaranteeing freedom of the press. They impose more comprehensive and more stringent control and are more repressive in effect than laws imposing penal sanctions on publication deemed improper. There is no justification for excepting motion pictures from the general rule that the press shall not be subject to regulation before publication.

II. The picture "Lady Chatterley's Lover" was banned because its theme was considered immoral. The supposed immorality consisted of the presentation of adultery in such a manner as to indicate approval. We assume for the purposes of this argument that the film did in fact condone or approve adultery. However, a communication may not be suppressed for that reason. The right of expression includes the right to make statements and express opinions that are contrary to the moral principles of the community. The denial of the right to make such statements is a violation of the speech and press guaranties of the First and Fourteenth Amendments.

III. Sections 122 and 122-a of the New York Education Law, which authorize the denial of the right to exhibit a film found "immoral," are so vague and indefinite that each administrator of the law must determine its meaning for himself and, in its application, enforce his personal views or notions of morality. An adverse decision by the administrator of the law results in the loss of substantial rights: the right of expression by means of talking pictures, and the right to exhibit a film for profit. Since the vagueness of the statute permits arbitrary application, one may be deprived thereunder of rights without "due process" of law.

IV. The condemnation and suppression of the film "Lady Chatterley's Lover" was unwarranted and improper. The intent of the film was misconceived and its dominant theme, which is of social importance, was ignored. The Appellees and the court below also erred in refusing to consider the excellence of workmanship and the aesthetic values of the moving picture, factors which far outweighed the aspects that the Appellees considered objectionable. Where such affirmative values exist, the First and Fourteenth Amendments are violated by the refusal to permit a film to be shown publicly.

Statement of the Case

The subject of this appeal is the ban in New York of the film "Lady Chatterley's Lover." The Appellant is the Distributor of the picture and has the sole right to show it or to license its exhibition in the United States (R. 6). In May, 1953, the Distributor sought and was refused a license to show the picture in New York (R. 6-7). The application was made to the Motion Picture Division of the

Department of Education of the State of New York, which issues such licenses (New York Education Law, §122). Since the public exhibition of a motion picture in the State without a license is a penal offense (New York Education Law, §131), the refusal of a license prevented the public showing of the film in New York.

The motion picture "Lady Chatterley's Lover" is an adaptation of the novel of the same name by D. H. Lawrence (R. 2). The Court below took judicial notice of Lawrence's talent as a writer (R. 52). Several of his novels, including "Lady Chatterley's Lover," are generally considered to be classics. The film is a faithful translation to the screen of the edition of the novel "Lady Chatterley's Lover," now freely sold throughout New York State (R. 2, 17).

The plot of "Lady Chatterley's Lover" concerns the relationship between Constance Chatterley, Sir Clifford Chatterley (her husband), and Oliver Mellors (their gamekeeper). Sir Clifford is crippled and impotent as the result of a war injury. He is the symbol of the rich and cynical industrialist, intent on the expansion of his coal mines, even at the cost of human life. Lady Chatterley is portrayed at the outset of the film as completely devoted to her husband. So that he may have an heir and in part to fill the emptiness of her life, Sir Clifford suggests that his wife have a child with some other man. Thereafter Lady Chatterley has an affair with the gamekeeper, Mellors. The gamekeeper is the foil for Sir Clifford. He is poor, as Sir Clifford is rich; simple and natural, as Sir Clifford is cynical and sophisticated; robust as Sir Clifford is crippled; and virile as Sir Clifford is impotent. Lady Chatterley, after learning that she is to have Mellors' child, attempts to secure her husband's consent to a divorce. When the divorce is refused she sacrifices wealth and social position

and, at the end of the picture, goes away to live with Mellors.

There is more to the picture than the incidents of the plot. It is a parable, a morality play in which the destructive forces of mechanization (represented by Sir Clifford) are pitted against what we shall call for want of a better term, the natural man, and in which the natural man finally triumphs. As Edmund Wilson wrote of the novel, "Lady Chatterley's Lover":

> "D. H. Lawrence's theme is a high one: the self-affirmation and the triumph of life in the teeth of all the sterilizing and demoralizing forces—industrialism, physical depletion, dissipation, careerism and cynicism—of modern English society; and the drama he has set in motion against the double and contrasting background of the collieries and the English forests has both solid reality and poetic grandeur." (The Shores of Light, pp. 404-405.)

The Motion Picture Division, after reviewing the picture, refused to license it for exhibition unless three isolated scenes were deleted. It found the sequences "immoral" (R. 10-11). In accordance with the New York moving picture censorship law (Education Law §124), the Distributor petitioned the Regents of the State of New York, for a review of that ruling. (The Department of Education and the Motion Picture Division are governed by the Regents of the State of New York, the appellees in this case.) The Distributor asked the Regents to reverse the Motion Picture Division on the grounds (in addition to the constitutional grounds) that the Division had acted inconsistently and arbitrarily and had erred in judging the film on the basis of a few isolated passages taken out of context. (R. 8, see *Roth* v. *United States*, 354 U. S. 476 at p. 489).

The Regents affirmed the Motion Picture Division's ruling and declared the *entire* picture immoral on the ground that the film presents "adultery as a desirable, acceptable and proper pattern of behavior." (R. 16)

The Regents' ruling was appealed to the Appellate Division of the Supreme Court of the State of New York for the Third Department. That court held that the denial of a license in this case was unconstitutional (R. 29). The Appellate Division found further that, "if any field of prior restraint is left open it would seem clear that the Supreme Court decisions forbid a statute as broad as the one under consideration" (R. 29).

The Regents then appealed to the New York Court of Appeals. That court reversed the determination of the Appellate Division. Although four of the seven judges of the Court of Appeals voted for reversal, only three of them were of the opinion that the statutes are valid. (We shall hereafter refer to their opinion, written by Chief Judge Conway, as the "prevailing opinion".) Judge Desmond, who voted to sustain the Regents, did so to afford this Court an opportunity to pass upon the constitutional questions. "Our question," he wrote in his concurring opinion, "is whether New York State may constitutionally refuse exhibition to a film because its subject matter is adultery presented as being right and desirable for certain people under certain circumstances. I confess doubt as to the validity of such a statute but I do not know how that doubt can be resolved unless we reverse here and let the Supreme Court have the final say." (R. 48)

Although it is not mentioned by the Regents, the symbolic drama of man's struggle against the evils of industrialization is too heavily underscored in the film,—as in the novel—to have been overlooked. As Mark Shorer wrote of "Lady Chatterley's Lover", "It is a novel in which

everything is symbolic, in which 'every bush burns' and which in itself finally forms one great symbol."[1] In the very first sequence of the moving picture one learns of the death of and injury to a number of miners at Sir Clifford's colliery. Then in a later scene at the mine one sees the bodies of injured workmen being carried from the pit. In another scene, great trees are uprooted and the land is torn up to prepare for new mine shafts. And it is not only because of the requirements of the plot that the industrialist is portrayed as impotent or unable to give life, and his protagonist, the natural man, is associated throughout the film with the nurturing of life.

To describe the film simply as the portrayal of adultery and as recommending it, is tantamount to describing the parable of the Prodigal Son as the tale of a young man who ran away from home, lived with harlots, and then returned to celebrate with his family.

Certainly the Regents—the governors of the Department of Education—could not have failed to comprehend the almost obtrusive symbolism of the film. They could not seriously have believed it was intended to encourage married women to run off with their gardeners. The Regents' objection to the film is based upon their lack of faith in the intelligence and character of the New York audience. It is based on the assumption that people who see the film will not have the intellect to understand the underlying intent, or the moral stamina to resist following the example of an adulterous relationship that is not explicitly condemned.

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[1] Shorer, On Lady Chatterley's Lover, Evergreen Review, vol. I, No. 1 (1957), p. 176.

POINT I

The New York film licensing laws impose a prior restraint on communication, prohibited by the First Amendment.

Precis

Motion pictures are a medium of expression and communication, and as such are entitled to the privileges, immunities and freedom guaranteed the press by the Constitution. The statutes under consideration provide for censorship and licensing of motion pictures prior to their distribution or "publication." The main purpose of the Constitutional Amendments prohibiting interference with the press is to prevent the imposing of such prior restraints.

We are not here concerned with punishment after distribution or exhibition, and it is not urged that exhibitors, distributors or producers of films should be free from responsibility for abuse of their constitutional rights. It is, on the contrary, urged that civil or criminal penalty for abuse is the appropriate remedy, and the only remedy consistent with the constitutional provisions guaranteeing liberty of the press.

The rationale of the prevailing opinion in the court below is that the power and influence of movies present a danger that can be met only by regulation prior to exhibition. The plain fact is that no such danger exists. There is no warrant for the exclusion of movies from the full protection of the Constitution.

For historical reasons, and because of differences in their effects, we distinguish between censorship laws designed to prevent publication, and those providing for punishment after publication. The statutes challenged here are the archetype of preventive censorship laws. They provide that a moving picture may not be shown in a public theater in New York until it is submitted to and approved by a board of examiners (Education Law §122, 129). If the examiners do not approve and license the picture, it may not be exhibited (Education Law §129).

The statutes thus impose a prior or previous restraint because they provide for government action or control *before* publication, i.e., before the moving picture may be shown to the public. The Constitutional guaranties of freedom of speech and press were designed primarily to bar any such prior restraint on communication. One of the first and most burdensome means of controlling the press in England was through the licensing of books by the Star Chamber (Emerson, The Doctrine of Prior Restraint, 20 Law and Contemporary Problems, p. 659; Encyclopedia Britannica (1947), vol. 18, p. 454). And for a considerable period no book or paper could be printed in the American Colonies without the consent of or license by the Crown Governors. (Encyclopedia Britannica (1947), vol. 5, pp. 115-116). The first struggle for freedom of the press was, therefore, directed against the licensing system (William H. Wickwar, The Struggle for the Freedom of the Press, pages 14-15; William E. Hocking, Freedom of the Press, page 3, *et seq.*).

In *Lovell* v. *Griffin*, 303 U. S. 444, Mr. Chief Justice Hughes said, referring to an ordinance that required a

permit for the distribution of books and pamphlets (303 U. S. at pp. 451-452):

> "We think that the ordinance is invalid on its face. Whatever the motive which induced its adoption, its character is such that it strikes at the very foundation of the freedom of the press by subjecting it to license and censorship. The struggle for the freedom of the press was primarily directed against the power of the licensor. It was against that power that John Milton directed his assault by his 'Appeal for the Liberty of Unlicensed Printing.' And the liberty of the press became initially a right to publish '*without* a license what formerly could be published only *with* one.' While this freedom from previous restraint upon publication cannot be regarded as exhausting the guaranty of liberty, the prevention of that restraint was a leading purpose in the adoption of the constitutional provision. See *Patterson* v. *Colorado*, 205 U. S. 454, 462."[2]

Books, magazines, newspapers and other printed matter and plays have not been subject to license or the necessity of securing the imprimatur of a government official. *Superior Films* v. *Dept. of Education*, 346 U. S. 587, concurring opinion of Mr. Justice Douglas. In 1915 this Court held that moving pictures were subject to prior censorship, not because they presented a special problem justifying exception to the rule forbidding prior restraint upon the press, but principally because the Court then found that moving pictures were merely "spectacles, not to be regarded * * * as part of the press of the country or as organs

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[2] See also *Respublica* v. *Oswald*, 1 U. S. (1 Dall.) 318, decided 1788; *Commonwealth* v. *Blandford*, 3 Pick. (20 Mass.) 304, decided in 1825; and *Staub* v. *Baxley*, 355 U. S. 313, at p. 322, decided 1958.

of public opinion." *Mutual Film Corp.* v. *Ohio Industrial Comm.*, 236 U. S. 230, 244.[3]

The question of the constitutionality of motion picture licensing was considered by the Court again in 1952 in the case of *Burstyn* v. *Wilson*, 343 U. S. 495. That case involved a moving picture "The Miracle" banned under the New York film censorship laws on the ground that it was "sacrilegious." The Court held in the *Burstyn* case that "expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments," and it overruled the language to the contrary in the *Mutual Film* case. *Burstyn* v. *Wilson*, 343 U. S. at p. 502.

The statute involved in the *Burstyn* case is, with a minor exception not here relevant, the same as the one under consideration in this case. Because it was unnecessary to a determination of the *Burstyn* appeal, the Court did not strike down the entire film censorship law but ruled that the New York statute unconstitutionally restricted freedom of the press in permitting censorship of a movie on the basis of so vague a standard as "sacrilegious," 343 U. S. at pp. 505-506.

Mr. Justice Clark, writing for the Court in that case, said of the New York licensing law (343 U. S. pp. 503-504):

> "The statute involved here does not seek to punish, as a past offense, speech or writing falling within the permissible scope of subsequent punishment. On the contrary, New York requires that permission to communicate ideas be obtained in advance from state officials who judge the content of the words and pictures

[3] That was ten years before the Federal Constitutional guaranty of freedom of the press was held (in *Gitlow* v. *New York*, 268 U. S. 652, 666) to preclude interference by state action or legislation. As Mr. Justice Clark noted in *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495 at p. 502, note 12, it was 11 years before talking pictures were first produced.

sought to be communicated. This Court recognized many years ago that such a previous restraint is a form of infringement upon freedom of expression to be especially condemned. Near v. Minnesota ex rel. Olson, 283 U. S. 697 (1931). The Court there recounted the history which indicates that a major purpose of the First Amendment guaranty of a free press was to prevent prior restraints upon publication, although it was carefully pointed out that the liberty of the press is not limited to that protection. It was further stated that 'the protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases.' *Id.*, at 716. In the light of the First Amendment's history and the Near decision, *the State has a heavy burden to demonstrate that the limitation challenged here presents such an exceptional case.*" (Emphasis ours.)

The burden of demonstrating the necessity for licensing laws has not been sustained in this case, or for that matter, in any other. The mere apprehension of a danger does not justify limiting the right of communication. To justify restraint of expression there must be something more than a fear of harm to society. It must be shown that the danger is imminent and sufficiently grave to override society's interest in and need of free expression. *Marsh* v. *Alabama*, 326 U. S. 501, 508-509; *Thomas* v. *Collins*, 323 U. S. 516, 529-530; *Bridges* v. *California*, 314 U. S. 252, 262; *Thornhill* v. *Alabama*, 310 U. S. 88, 95, 96; *Schneider* v. *State*, 308 U. S. 147, 161-162; *DeJonge* v. *Oregon*, 299 U. S. 353, 365; *Stromberg* v. *California*, 283 U. S. 359, 369. Mr. Justice Brandeis wrote in his dissent in *Whitney* v. *California*, 274 U. S. 357, 376: "Fear of serious injury alone cannot justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears."

No evidence has yet been advanced to show that moving pictures present such clear and imminent danger of substantive evil, or present "such an exceptional case" as to justify the drastic controls imposed by the licensing statutes. The prevailing opinion below begs the question, citing the *Burstyn* case as authority. "The greater capacity for evil which inheres in motion pictures," the prevailing opinion states, "has been recognized by the highest Federal tribunal as 'relevant in determining the permissible scope of community control' (*Burstyn* v. *Wilson*, p. 502)." (R. 39)

The Court did not, in the *Burstyn* case, recognize that a greater capacity for evil inheres in motion pictures. Mr. Justice Clark, speaking for the Court did in fact say, at the cited page (343 U. S. at p. 502):

> "It is further *urged* that motion pictures possess a greater capacity for evil, particularly among the youth of a community, than other modes of expression. Even if one were to accept this hypothesis, it does not follow that motion pictures should be disqualified from First Amendment protection. If there be capacity for evil it *may* be relevant in determining the permissible scope of community control, *but it does not authorize substantially unbridled censorship such as we have here.*" (Emphasis ours.)

The New York Court of Appeals had previously taken judicial notice of the fact that there is no objective evidence of the alleged evil impact or inherent evil of the movies.[4] In *Brown* v. *Kingsley Books* (1 N. Y. 2d 177), the Court noted (at p. 181, footnote 3):

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[4] In an article published in The New York Times, August 28, 1955, entitled "Censorship, Logic and the Law," Dr. Hugh Flick, then Chief of the New York motion picture censorship division, wrote:

> "Although much has been written on the impact of the mass media of communication and many claims are made concerning

"* * * studies are for the first time being made, through such scientific skills as exist, concerning the impact of the obscene, in writings and other mass media, on the mind and behavior of men, women and children. (See, *e. g.*, Jahoda and Staff of Research Center for Human Relations, New York University (1954) The Impact of Literature: A Psychological Discussion of Some Assumptions in the Censorship Debate.)"

Dr. Jahoda's study when published indicated that as no group of the population is exposed to only one of the mass media, the effect or impact of any one, such as the movies, could not be determined. In the summation of the study, Dr. Jahoda wrote:

"There is a large overlap in content matter between all media of mass communication. The daily press, television, movies, radio and fictional printed material all present their share of the so-called 'bad' material, varying in the degree of reality attached to these matters. It is virtually impossible to isolate the impact of one of these media on a population that is exposed to all of them. Some evidence suggests that the particular communications to which an individual exposes himself are probably in good part a matter of choice. The reader does not take in everything that is offered but mostly what he is predisposed to take. In the realm of attitudes, this means that adult

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the dangerous effects of motion pictures, comic books and television, there appears to be no single study that has as its objective the examination of impact of all the methods of communication.

If such a study could be undertaken * * *. *The conclusions would for the first time provide a basis upon which we could judge the wisdom or folly of state laws requiring the pre-release examination of motion pictures,* * * *." (Emphasis ours.)

people prefer to expose themselves to material which expresses attitudes they already hold * * *." The Impact of Literature: A Psychological Discussion of Some of the Assumptions in the Censorship Debate, p. 44.

Dr. Jahoda's study indicates that there is no factual basis for distinguishing between the kind of censorship permissible under the First Amendment for books, magazines and plays, and that constitutionally allowable for moving pictures.

Moreover, the conclusion that uncensored motion pictures present a danger to the public welfare and morality that can be met *only* by licensing (R. 40) does not seem warranted in view of the fact that only four states[5] and a few cities have motion picture licensing laws. The Court may take judicial notice that the people of the several thousand cities in the other forty-five states have not been unredeemably corrupted by uncensored films.[6] Even in states where only licensed movies may be exhibited in theaters, unlicensed films can be seen over television. *Allen B. Dumont Laboratories* v. *Carroll*, 184 Fed. 2d 153 (3rd cir.); Entertainment: Public Pressures and the Law, 71 Harvard L. R. 326, 334-335. It cannot, therefore, be urged that the licensing system is a necessary or an appropriate means of meeting the alleged danger presented by objectionable movies.[7]

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[5] Kansas, Maryland, New York and Virginia.

[6] Nimmer, the Constitutionality of Official Censorship of Motion Pictures, 25 University of Chicago L. R. 625, at p. 656

[7] The statutes, it should be noted, are not designed to prevent the showing of "out and out pornography". A person dealing in such films would not be likely to present them for license. Obscene moving pictures shown at "smokers" or private clubs are not affected by the statutes, which apply only to films shown in public theaters.

The prevailing opinion below suggests that the large audiences reached by motion pictures, and the "saturation techniques" employed by the motion picture industry in showing a moving picture in many theaters simultaneously, justify more stringent regulation of moving pictures than of other media of the press (R. 41). The argument assumes conditions that do not exist. A moving picture when initially released is generally exhibited at one, or at most a few, first-run theaters in the state. When the first-run is completed, it is shown in second-run theaters, then in third and fourth-run theaters, etc. (See *United States* v. *Paramount Pictures*, 334 U. S. 131, pp. 167 *et seq.*). An initial simultaneous showing of a film in any significant number of theaters would not be economically practicable.[8] It may be assumed that the penal laws will be enforced with reasonable speed during the first exhibition, to prevent injury to any large number of people from indecent or immoral movies. Many tabloids and picture magazines, on the other hand, are distributed simultaneously to millions of readers.[9] The harm that might be caused by the publication of immoral or obscene matter in periodicals[10] could not be seriously urged today as jus-

[8] There are about 1160 moving picture theaters in the State of New York (U. S. Bureau of the Census, 1954 Census of Business — New York, pp 32-5.) so that the total seating capacity of all the theaters would be approximately 450,000. The same film will not ordinarily be shown simultaneously in more than a small percentage of the total number of theaters.

[9] The New York Daily News has a circulation of 2,079,423 on weekdays and 3,480,905 on Sunday; The New York Daily Mirror has a daily circulation of 871,705 and a Sunday circulation of 1,308,100; The Readers Digest has a paid circulation of 11,508,322 (there are on an average several readers of each copy sold); and Life Magazine has a weekly circulation of 5,851,168 (also with several readers per copy). Directory of Newspapers and Periodicals, 1958, pp. 724, 720, 751 and 717; N. W. Ayers & Son.

[10] See The Commission on Freedom of the Press, A Free and Responsible Press, page 3.

tification for licensing them. As Mr. Chief Justice Hughes wrote in *Near* v. *Minnesota*, 283 U. S. 697, 720:

> "The fact that the liberty of the press may be abused * * * does not make any the less necessary the immunity of the press from previous restraint. * * * Subsequent punishment for such abuses as may exist is the appropriate remedy, consistent with constitutional privilege."

The rule applies with equal force to talking pictures.

The resistance to prior regulation of communications has more than an historical base. It exists primarily because such controls are broader, more stringent and more oppressive than a system of punishment after publication.

A licensing system, through the very fact of its existence, inhibits freedom of expression.[11] There is no right of speech or press if one must seek and obtain permission before he may express his ideas. "A system of prior restraint normally brings within the complex of government machinery a far greater amount of communication than a system of subsequent punishment. It subjects to government scrutiny and approval all expression in the area controlled—the innocent and borderline as well as the offensive, the routine as well as the unusual. The machinery is geared to universal inspection, not to scrutiny in particular cases which are the subject of complaint or otherwise come to the attention of prosecuting officials. The pall of government control is, thus, likely to hang more pervasively over the area of communication, and

[11] It has the corollary effect of curtailing the public's right to hear and assess varied ideas and expressions of opinion. Mr. Justice Rutledge, in a concurring opinion in *United States* v. *C.I.O.*, 335 U. S. 106, stated that the freedom of speech and assembly guaranteed by the First Amendment "involve the right to hear as well as to speak, and any restriction upon either attenuates both" at pp. 143-144. See also *Marsh* v. *Alabama*, 326 U. S. 501.

more issues are likely to be resolved against free expression." *Thomas Emerson*, The Doctrine of Prior Restraint, 20 Law & Contemporary Problems, pp. 656-657. See also *Winters* v. *New York*, 333 U. S. 507, 509-510; *Stromberg* v. *California*, 283 U. S. 359, 369.

Mr. Justice Murphy wrote in *Thornhill* v. *Alabama*, 310 U. S. 88, at pp. 97-98:

> "The power of the licensor * * * is pernicious not merely by reason of the censure of particular comments but by reason of the threat to censure comments on matters of public concern. It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion. See *Near* v. *Minnesota*, 283 U. S. 697, 713 * * *. The existence of such a statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview."

One of the most objectionable aspects of the licensing system is that the determination of whether a particular film offends the law is left generally to the discretion of the administrative official acting as censor. Where penal sanctions are imposed, the defendant and the communications are protected by the procedural safeguards of presumption of innocence,[12] by jury trial in many instances,[13]

[12] See also opinion of Chief Judge Learned Hand in *Kepner* v. *United States*, 195 F. 2d 152 (quoted at p. 33 of this brief) with respect to the affirmative burden of proof.

[13] Mr. Justice Brennan dissenting in *Kingsley Books* v. *Brown*, 354 U. S. 436, wrote at p. 448:

> "* * * The jury represents a cross-section of the community and has a special aptitude for reflecting the view of the average

and by right of full judicial review. There is, it is true, a right of review from the censor's decision, but it is of little value.[14] The question before the court on appeal is whether the censor acted arbitrarily; the burden of showing that the censor acted unreasonably rests upon the one who challenges the censor's decision (*Brown* v. *Kingsley Books*, 1 N. Y. 2d 177, 185, 186, aff'd 354 U. S. 436; *Distinguished Films* v. *Stoddard*, 271 App. Div. (N. Y.) 715; *Commercial Pictures Corp.* v. *Regents*, 280 App. Div. 260, aff'd 305 N. Y. 336, rev'd on other grounds 346 U. S. 587.) and it is an almost impossible one to sustain. "Where licensing is vested in the first instance in an administrative agency, the available judicial review is in effect rendered inoperative." Mr. Justice Frankfurter concurring in *Burstyn* v. *Wilson*, 343 U. S. at 532. See also *Speiser* v. *Randall*, 357 U. S. 513, 520, 524.

Even an adequate right of review is of little avail where the communication deals with a current problem. Legal processes are slow. The film "Lady Chatterley's Lover," for example, was denied a license in May, 1956 (R. 10). The New York Court of Appeals did not render

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person. Jury trial of obscenity therefore provides a peculiarly competent application of the standard for judging obscenity which, by its definition, calls for an appraisal of material according to the average person's application of contemporary community standards. A statute which does not afford the defendant, of right, a jury determination of obscenity fails short, in my view, of giving proper effect to the standard fashioned as the necessary safeguard demanded by the freedoms of speech and press for material which is not obscene."

[14] The prevailing opinion below suggests that adequate judicial review of any refusal to license a film is always available "the courts of this State," the opinion states, "will always be alert to excesses and most quick to correct them, as indeed we were recently in the *Excelsior case*" (R. 41). The reference is to *Matter of Excelsior Pictures Corp.* v. *Regents*, 3 N. Y. 2d 237, in which the New York Court of Appeals overruled the Regents' refusal of a license. It was the first such action taken by the Court. Three of the seven Judges dissented and voted to sustain the ban of the film.

its decision respecting Appellant's right to show the film until two years later (R. 30). It is little satisfaction to those who would speak or publish and to those who wish to see and hear, that their rights may be vindicated in several years.

No tenable reason has been advanced for sustaining New York's film licensing law as an exception to the general constitutional prohibition against prior restraints of expression, and there are many cogent reasons for striking it down. The basic issue of whether the New York statutory licensing system is void as a prior restraint prohibited by the First and Fourteenth Amendments was raised in *Burstyn* v. *Wilson*, 343 U. S. 495. The Court then had before it a type of comprehensive legislation that it had not considered or passed on for 37 years. The Court in *Burstyn* therefore limited its decision to the necessities of the case, although it indicated hostility to censorship in advance of publication.

Since then[15] the issues have been fully presented, refined and considered. After the *Burstyn* case, this Court took jurisdiction of a number of other cases involving motion picture licensing laws. In a series of memorandum decisions the Court in effect held the following terms or standards too vague and indefinite to meet constitutional requirements when used in censorship statutes: "prejudicial to the best interests of the people" (*Gelling* v. *Texas*, 343 U. S. 960); "immoral" (*Commercial Pictures Corp.* v. *Regents*—decided with *Superior Films, Inc.* v. *Dept. of Education*, 346 U. S. 587); "harmful" (*Superior Films, Inc.* v. *Dept. of Education*, 346 U. S. 587); and "obscene or immoral or such as tend to debase or corrupt morals" (*Holmby Productions, Inc.* v. *Vaughn*, 350 U. S. 870).

The State courts and lower Federal courts have variously interpreted the rulings of this Court in *Burstyn* and

[15] 1952

the later cases cited, to mean that prior censorship of motion pictures is unconstitutional, or that it is generally permissible, or that it is permissible only if such censorship is on the ground of obscenity. (See *Brattle Films, Inc.* v. *Com'r of Public Safety*, 333 Mass. 58; *Matter of Excelsior Pictures Corp.* v. *Regents*, 3 N. Y. 2d 237; *Hallmark Productions, Inc.* v. *Carroll*, 384 Pa. 348; *Commercial Pictures Corp.* v. *Regents*, 305 N. Y. 336, rev'd 346 U. S. 587; *Superior Films* v. *Dept. of Education*, 159 *Ohio St.* 315, rev'd 346 U. S. 587; *Holmby Productions, Inc.* v. *Vaughn*, 177 Kan. 728, rev'd 350 U. S. 870; *Times Film Corp.* v. *City of Chicago*, 244 Fed. 2d 432, rev'd 355 U. S. 35; and the 6 opinions in the instant case.) (R. 27-55) It is respectfully submitted that a determination of the basic question by this Court, will avoid further confusion and a multiplicity of further suits.

Also, since this attack is on a law purporting to license the dissemination of ideas, there is no policy requiring avoidance of the broad Constitutional question. *Thornhill* v. *Alabama*, 310 U. S. 88, 97 and cases there cited; Avoidance of Constitutional Issues in Civil Rights Cases, 48 Columbia L R 427.

"Were we dealing with newspapers or books or with a stage play," Judge Fuld wrote in his dissenting opinion in the Court below, "there could be no question as to the unconstitutionality of the statute under consideration, and I perceive no basis for distinguishing between such forms of expression and a moving picture. The Constitution protects all expression and is limited neither by the thoughts put forth nor by the medium employed. It protects the transmission of ideas and beliefs, whether orthodox or unorthodox, popular or unpopular, and its protection extends alike to words uttered in the street, a public hall or a theatre (with actors live or on a screen) and to

words written in newspapers, books or motion picture subtitles. A belief does not lose its character as a belief, an idea does not become less of an idea, because, instead of being expressed by the airborne voice, the printed word or the still picture, it is put forward by a moving picture with a sound track. The First Amendment does not inquire whether the medium is visual, acoustic, electronic or one yet to be devised, nor does it seek to know the speed of dissemination or the size of the audience. In short, the Amendment's meaning and vitality may not be conditioned upon the mechanism involved, and the differences existing between a book and a moving picture do not support a holding that the freedom of expression assured by the Constitution is inapplicable to the moving picture." (R. 53-54)

POINT II

Sections 122 and 122-a.1 of the New York Education Law contravene the First and Fourteenth Amendments to the United States Constitution in authorizing the suppression of opinion.

"Lady Chatterley's Lover" was banned as "immoral" under Education Law §§ 122 and 122-a.1 because the ideas presented were thought evil, not because of the manner in which the ideas were presented.[18] The film was denied a license because it allegedly presents adultery as acceptable or proper behavior. (R. 16, 33)

[18] Here is an attempt to equate "immorality" as used in the Sections 122 and 122-a.1 of the New York Education Law with "obscenity" cloaked outside the area of constitutionally protected speech in *Roth v. United States*, 354 U.S. 476. However, "Lady Chatterley's Lover" was not found obscene. As Judge Dye noted in his dissenting opinion below: "No one contends that the film in question is obscene within the narrow legal

Only three kinds of utterance have been held by this Court to be outside the area of Constitutionally protected expression. They are: libelous statements (*Beauharnais v. Illinois*, 343 U. S. 250); obscenity (*Roth v. United States*, 354 U. S. 476); and speech threatening violent destruction of the Government if such speech is coupled with a plan or conspiracy to carry it into effect (*Dennis v. United States*, 341 U. S. 494).

The statutes under consideration seek to extend the area of unprotected communication to speech challenging the moral order. The power of the State cannot be exercised to force the contents of movies, or of any communication into any ideological pattern. The script writer or movie maker is not required to produce moral tracts. He is not required to become a propagandist for the censor's principles. Whatever one's opinion may be with respect to the role of movie producer in society, the government cannot compel him to serve morality, or purge his work if it questions the moral assumptions of the community.[17]

It is not claimed that "Lady Chatterley's Lover" specifically incites the commission of adultery, but merely

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of obscenity as recently defined by the Supreme Court * * * The Regents have banned a showing of this film in its entirety because, in their opinion, its theme is *contra bonos mores*, and this in the face of the circumstance that the book on which it is based, has long been published and circulated freely without benefit of administrative censorship". (R. 51).

See also *Times Film Corporation v. City of Chicago*, 244 Fed. 2d 432, at p. 435, rev'd 355 U. S. 35, and *Winters v. New York*, 294 N. Y. 545, rev'd 333 U. S. 507, in which the courts attempted in the same manner to give precision to the term "immoral."

[17] "I am not an ordinary playwright in general practice. I am a specialist in immoral and heretical plays. My reputation has been gained by my persistent struggle to force the public to reconsider its morals. In particular I regard much current morality as to economic and sexual relations as disastrously wrong * * *" George Bernard Shaw—The Selected Prose of George Bernard Shaw, p. 375.

that by the presentation of a glamorous example through an effective medium, it may mislead the impressionable. The advocacy of a doctrine, no matter what mischief would result from its adoption, is within the protection of the Constitution. Even advocacy of the overthrow of the Government by force (when not accompanied by illegal incitement to action) may not be punished or restrained. *Yates* v. *United States*, 354 U. S. 298, 318, 322; *Speiser* v. *Randall*, 357 U. S. 513, 529 (concurring opinion of Mr. Justice Black); *United States* v. *Dennis*, 183 Fed. 2d 201, 207; *Dennis* v. *United States*, 341 U. S. 494, at pp. 512-513. It "cannot be the duty because it is not the right of the State to protect the public against false doctrine." *Thomas* v. *Collins*, 323 U. S. 516, p. 545, Mr. Justice Jackson concurring.

In *Reynolds* v. *United States*, 98 U. S. 145, Chief Justice Waite in sustaining the conviction of a Mormon for bigamy made it clear that the legislative power can punish *action* subversive of good order, but that it could not reach opinion. In discussing that principle, his opinion quotes the following, written by Thomas Jefferson:

> "'That to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy * * *' it is declared 'that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order'." 98 U. S. at p. 163[18]

Nor does the persuasive or "alluring" presentation of an opinion deprive one of the right to give it currency. If the protection of the Constitution is afforded only to uncon-

[18] See also, *Musser* v. *Utah*, 333 U. S. 95, 101-103 (Rutledge, J. dissenting).

vincing speech, the guaranty of freedom of expression would be of little value.

Section 122-a.1 of the New York Education Law is designed to protect children, morons and potential felons from evil influence, but it also affects and regulates the fare intended for normal adults. The stated purpose of the New York Legislature in enacting the section (which purports to give precise definition to the term 'immoral' as used in Section 122) was to protect "not * * * the mature and intelligent, with minds strengthened to withstand the influence of salacious presentations, but * * * the young and immature, the ignorant and the sensually and criminally inclined." (State Education Department Memorandum, New York State Legislative Annual, 1954, p. 37) A restriction of expression affecting all people, to ideas suitable for the immature, the ignorant and the sensually and criminally inclined is an unconstitutional curtailment of the right of communication (*Butler* v. *Michigan*, 352 U. S. 380; *Roth* v. *United States*, 354 U. S., at pp. 488-489).

POINT III

The statute under which "Lady Chatterley's Lover" was suppressed does not meet the constitutional requirements of a statute governing the press. The enforcement of the statute deprived appellant of its rights and property without due process of law.

The constitutional objection to a vague law regulating speech or press is that such law does not impose a standard upon those administering it. Since the law itself does not furnish any guide, its administrators are compelled to determine for themselves the boundaries of the law and the extent of their powers under it. There is no protection under such law against arbitrary interpretation and inter-

ference with the right of communication. Since each administrator determines the meaning of the statute for himself, the effect of the statute changes with the person of the administrator. In consequence there is in effect no regulation by law, but regulation in accordance with the convictions of the individual in authority. *Jordan* v. *DeGeorge*, 341 U. S. 223, 239, 240; *Musser* v. *Utah*, 333 U. S. 95, 97; *Winters* v. *New York*, 333 U. S. 507, 515, 518; Due Process Requirements of Definiteness in Statutes, 62 Harvard L. R. 77.

Where legislation permits or authorizes such personal control of so basic a civil right as the right to communicate and to receive communication freely, it is void on its face. The possibilities of abuse inherent in the statute render it void in its entirety. "It is settled" as Mr. Justice Reed said in *Winters* v. *New York*, 333 U. S. 507, 509,

> "that a statute so vague and indefinite, in form and as interpreted, as to permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee of free speech is void on its face as contrary to the Fourteenth Amendment. *Stromberg* v. *People of the State of California*, 283 U. S. 359, 369; *Herndon* v. *Lowry*, 301 U. S. 242, 258. A failure of a statute limiting freedom of expression to give fair notice of what acts will be punished and such statute's inclusion of prohibitions against expressions protected by the principle of the First Amendment, violates an accused's rights under procedural due process and freedom of speech or press."

See also, *Thornhill* v. *Alabama*, 310 U. S. 88, 96-98; *Stromberg* v. *California*, 283 U. S. 359, 369; Inseparability in Application of Statutes Impairing Civil Liberties, 61 Harvard L. R. 1208, 1209-1210. The deprivation of the right of communication pursuant to such void statute is without "due process of law." *Burstyn* v. *Wilson*, 343

U. S. 495, at p. 503 and p. 532 (concurring opinion of Mr. Justice Frankfurter); *Niemotko* v. *Maryland*, 340 U. S. 268, 271.

The relevant portions of Section 122 of the New York Education Law require the ban of films found "immoral or of such a character that its exhibition would tend to corrupt morals." In *Commercial Pictures Corp.* v. *Regents*, 346 U. S. 587 (decided under the caption *Superior Films, Inc.* v. *Dept. of Education of State of Ohio*), this Court considered the question of whether those terms as used in the statute under consideration are too indefinite to meet constitutional requirements. The memorandum opinion of the Court in that case indicates that the Court found the standard of "immorality" so vague and indefinite that the ban of a film on that ground was without "due process."[19]

The decision of the Supreme Court in the *Commercial Pictures Corp.* case (346 U. S. 587) was handed down January 18, 1954. In April, 1954, the New York legislature, to overcome the constitutional objections to the terms "immoral" and "of such character that its exhibitions would tend to corrupt morals", enacted Education Law §122-a.1 which purports to define and limit their application.

It is clear from a reading of Section 122-a.1 that the "definition" is no clearer or more precise than the term defined. Section 122-a.1 provides:

> "For the purpose of section one hundred twenty-two of this chapter, the term 'immoral' and the phrase 'of such a character that its exhibition would tend to corrupt morals' shall denote a motion picture film or

[19] See also *Holmby Productions Inc.* v. *Vaughn*, 350 U. S. 870 and *Times Film Corporation* v. *City of Chicago*, 244 Fed. 2d 432, 436, rev'd 355 U. S. 35.

> part thereof, the dominant purpose or effect of which is erotic or pornographic; or which portrays acts of sexual immorality, perversion, or lewdness, or which expressly or impliedly presents such acts as desirable, acceptable or proper patterns of behavior."

The section is so loosely and poorly drawn, in the light of the prior decisions, that one is justified in concluding that the statute was not intended to clarify the law but to circumvent the ruling of this Court in the *Commercial Pictures Corp.* case, 346 U. S. 587. The terms "erotic", "pornographic", "lewdness", "proper patterns of behavior", etc. which purport to define the term "immoral" in Section 122-a of the Education Law do not purge the word "immoral" of ambiguity. They are merely terms of disapprobation. Their application to a given film is a denunciation, not an objective description of the content to be suppressed. The terms do not impose any standards limiting the exercise of the censor's discretion, nor do they furnish any guide to the motion picture producer, or distributor.

The Appellate Division of the Supreme Court of the State of New York, in holding Section 122-a.1 unconstitutional in this case, said (in the opinion delivered by Mr. Justice Coon):

> "Ordinarily such a word as 'immoral', which might have one meaning to one person or group of persons and another meaning to another person or group of persons, cannot be defined with such exactness or precision as would leave no field of individual opinion and discretion open to the viewer. Adding more adjectives or more words which are likewise open to different opinion helps little. * * *
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> "For instance, under section 122-a, the censoring body must determine what 'the dominant purpose or effect' of a picture is, a matter upon which different

people or groups of people might disagree. The same is true as to what constitutes 'acts of sexual immorality, perversion, or lewdness.'

"As we interpret the decisions of the Supreme Court of the United States in the *Burstyn* case, the *Commercial Pictures* case, and *Holmby Productions* v. *Vaughn* (350 U. S. 870), a statute which leaves any field open to the opinion, discretion or individual point of view of a censor in banning a moving picture violates the Fourteenth Amendment. If any field of prior restraint is left open it would seem clear that the Supreme Court decisions forbid a statute as broad as the one under consideration." (R. 28-29)

And Judge Dye wrote of Section 122-a.1 in his dissenting opinion in the court below:

"However well intentioned, the language as used still falls short of providing fundamental standards deemed essential for the guidance of administrative discretion. The added words are no more meaningful than the term 'sacrilegious', 'immoral', 'tend to incite to crime', 'prejudicial to the best interests', 'harmful and indecent', all found too general and unprecise to meet constitutional standards (*Joseph Burstyn, Inc.* v. *Wilson, supra; Matter of Commercial Pictures* v. *Board of Regents, supra; Winters* v. *New York*, 333 U. S. 507; *Gelling* v. *Texas*, 343 U. S. 960; *Superior Films* v. *Department of Education of Ohio;* 346 U. S. 587, *supra; Matter of Excelsior Pictures Corp.* v. *Regents*, 3 N. Y. 2d 237; *Holmby Prods* v. *Vaughn*, 350 U. S. 870; *Hallmark Prods.* v. *Carroll*, 384 Pa. 348). The term 'immoral' as used in section 122 has not been clarified by the amendment. It is still vague and indefinite. When the censor relies on the term 'immoral' as a basis for prior restraint, he necessarily must resort to his own notion of its meaning since the statute itself provides no test or standards to guide him in the exercise of his discretion" (R. 50).

The New York Legislature in enacting Education Law §122-a.1 stated that its intent was to limit the meaning of the word immoral in the motion picture censorship law, so that it would apply only to *sexual immorality* (Governor's Message on Approving L. 1954 ch. 620. McKinney's Session Laws of New York, 1954, p. 1404).

However, the term "immoral" was limited in its application to "sexually immoral" acts when it was held unconstitutionally vague by this Court. The New York Court of Appeals, in *Commercial Pictures Corporation* v. *Regents*, 305 N. Y. 336, had previously ruled that the term "immoral" as used in Education Law §122 referred only to "sexual immorality." 305 N. Y. at pp. 345-346 (See also *Broadway Angels* v. *Wilson*, 282 App. Div. 643, and R 33-34). As Counsel for the Regents argued, in his brief to this Court in the *Commercial Pictures* case, the Supreme Court was bound by that construction in passing on the validity of the law. (See *Kedroff* v. *St. Nicholas Cathedral*, 344 U. S. 94) The Supreme Court in reversing the decision of the New York Court of Appeals, in the *Commercial Pictures* case, thus found the statutory standard of "*sexual immorality*" to be unconstitutionally vague and the New York Legislature, in enacting §122-a.1 did not further limit or define its meaning sufficiently at least to meet constitutional requirements.

In *Matter of Commercial Pictures Corp.* v. *Regents*, 305 N. Y. 336, the court, in construing section 122 of the Education Law, also held that the censor is required to apply the "moral standards of the community" rather than his own in determining whether a picture is "immoral." (305 N. Y., at p. 344.)[20] Presumably that was intended as a

[20] If one is to judge community standards by the conduct of the people rather than the attitudes they profess, it would appear that adultery is not so uncommon or repugnant to the community mores as the prevailing opinion below indicates. See Kinsey, Sexual Behavior of the Human Male, p. 585. See also *Schmidt* v. *United States*, 177 F. 2d, pp. 451-452.

limitation upon the censor's exercise of personal discretion. How one is to determine community attitudes generally, or with respect to a particular film that has not been exhibited publicly, is not made clear.

There is, of course, no available method for learning the community's attitude (if there is a general attitude), on questions of sexual morality. Where a statute requires one to judge in accordance with the moral sentiments of the people of a State, the person administering the law must either guess what people generally feel or substitute his own judgment. *United States ex rel. Iorio* v. *Day*, 34 F. 2d 920, 921; *Repouille* v. *United States*, 165 F. 2d 162; *Schmidt* v. *United States*, 177 F. 2d 450; Cahn, Authority and Responsibility, 51 Columbia L. R. 838.

In *Repouille* v. *United States*, 165 F. 2d 152, Chief Judge Learned Hand wrote (p. 153):

> "Very recently we had to pass upon the phrase 'good moral character' in the Nationality Act; and we said that it set as a test * * * whether it conformed to 'the generally accepted moral conventions current at the time.' In the absence of some national inquisition, like a Gallup poll, that is indeed a difficult test to apply; often questions will arise to which the answer is not ascertainable, and where the petitioner must fail only because he has the affirmative. * * * Many people—probably most people—do not make it a final ethical test of conduct that it shall not violate law; few of us exact of ourselves or of others the unflinching obedience of a Socrates."

And Judge Desmond of the New York Court of Appeals, in voting to sustain the validity of §122-a.1 in this case, said:

> "*I confess my own inability to determine* whether or not an average person, applying to 'Lady Chatterley's Lover' the *undiscoverable* standards of a hypothetical community, would consider that the dominant theme of the whole film appealed principally to prurient interest or to artistic sensibilities or to a mature and adult interest in one of the lively arts." (R. 46, emphasis ours.)

In *Schmidt* v. *United States* (177 Fed. 2d 450) the court passed upon the application for citizenship of an unmarried man who engaged in "casual, concupiscent and promiscuous, but not adulterous" sexual intercourse. In determining that the applicant was of good moral character, the court said (again per Chief Judge Hand) (177 Fed. 2d, p. 451):

> "In Petitions of Rudder et al. * * * each of several aliens had been living for years with a single woman in an adulterous union, which apparently had not been concupiscent. Either the alien or the woman had been unable, for one reason or another, to get a divorce. We admitted them all because we did not 'believe that the present sentiment of the community views as morally reprehensible such faithful and long continued relationships under the circumstances here disclosed.' In United States v. Rubia (5th Cir., 110 F. 2d 92) the alien was admitted upon substantially the same facts, save that he had had a good war record."
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> * * *
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> "* * * In two very recent cases the Third Circuit by an equally divided court of all six judges, affirmed orders admitting two aliens (as persons of "good moral character") in the following circumstances. In the first case, an unmarried man admitted that he had had occasional meretricious relations with a single woman for pay; in the second case, the facts were the same, except that the alien had a wife and children in

Italy, from whom he had apparently not been legally separated." [21]

The test of vagueness in a statute is that " men of common intelligence must necessarily guess at its meaning and differ as to its application * * *" *Winters* v. *New York*, 333 U. S. 507, 517-518. The instant case furnishes an excellent illustration of the vagueness of the term "immoral" as defined by Section 122-a.1. The examiners of The Motion Pictures Division found that only three isolated sequences (of a few moments' duration) were immoral (R. 10-11). Their superiors, the Appellees, found the entire picture immoral. Of the 12 New York State judges who saw the film (5 of the Appellate Division and 7 of the New York Court of Appeals), only three ruled that the film is immoral.

Section 122-a, although it purported to clarify and limit the meaning of the terms "immoral" and "tend to corrupt morals", in the censorship law, made no legally recognizable change in their meaning, or in the scope of the law. The determination of this Court that the word immoral as used in Education Law §122 is unconstitutionally vague (in *Commercial Pictures Corp.* v. *Regents*, decided *sub nom. Superior Films* v. *Dept. of Education*, 346 U. S. 587), applies with equal, if not greater, force to the definition of the term in Education Law §122-a.1.

[21] In *Musser* v. *Utah*, 333 U. S. 95, Mr. Justice Jackson's comment on the statutory phrase "injurious to public morals" was that it "led to the inquiry as to whether the statute attempts to cover so much that it effectively covers nothing" (333 U. S., at p. 97).

See also Petition of R 56 F. Supp. 969; Petition of Lieberman, 50 F. Supp. 121.

POINT IV

The suppression of the film "Lady Chatterley's Lover" was arbitrary and unwarranted.

Even if the laws here challenged are held constitutional and the suppression of "immoral" opinion is countenanced, the decision sustaining the ban of the picture "Lady Chatterley's Lover" should be reversed because the film is "not of the character that the first amendment permits a State to exclude from public view." *Burstyn* v. *Wilson*, 343 U. S. 495, at pp. 506-7. (Concurring opinion of Mr. Justice Reed.)

The censorship of a "particular writing or other tangible form of expression * * * raises an individual constitutional problem in which the reviewing court must determine for itself whether the attacked expression is suppressable within constitutional standards". (Mr. Justice Harlan concurring and dissenting in *Roth* v. *United States*, 354 U. S. at p. 497.)

The reason advanced for the refusal to license "Lady Chatterley's Lover" is that it glorifies adultery[22] and presents it as socially acceptable behavior. (R. 16) The adulterous relationship between Lady Chatterley and Mellors

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[22] It is of interest that the adjective most frequently used to describe Lawrence's atitude towards sexual morality is "puritanical". Professor Mark Shorer speaks of D. H. Lawrence as "perhaps the only important Puritan in his generation" (On Lady Chatterley's Lover, Evergreen Review, Vol. I No. 1 (1957) p. 176). Earl H. Brewster said of Lawrence, "He was a Puritan—a term I often heard applied to him in his presence." (Edward Nehls, D. H. Lawrence, A Composite Biography, Vol. III (1959) p. 135) and Father William Tiverton, an Anglican priest wrote "all his friends have testified to the puritan in Lawrence." Tiverton, D. H. Lawrence and Human Existence (1951) p. 77. "Lawrence the Puritan", Sigrid Undset, The Achievement of D. H. Lawrence, p. 58 "Lawrence was in many instances a puritan". F. Hoffman, *Id.*, p. 112.

is merely subsidiary to or part of the major theme of the story. The dominant theme is the destructive impact of industrialization on personality and on life.

> "Lady Chatterley's Lover, like everything that Lawrence wrote, is an affirmation of life values as against the mechanization of human nature. This, his general subject matter, may be broken down into two major themes; the relation of men and women, and the relation of men and machines. In the works as they are written, the two are one, and his most subtle and penetrating perception, the knowledge that social and psychological conflicts are identical, is so firmly integrated in the structure of his books that it is almost foolhardy to speak of his having two themes when in fact he had one vision". Shorer, On Lady Chatterley's Lover, Evergreen Review, Vol. I, No. 1, pp. 161-162.[23]

The Regents totally ignored that aspect of the film and they failed or refused to consider other factors that have an important bearing on the question of whether the film may be suppressed. The Answer made by the New York censorship board to the initial petition in this proceeding states that the allegations with respect to the "artistry, good taste and purpose of the * * * film are irrelevant". (R. 14). Such considerations are not irrelevant, and we believe the film reflects the high artistic integrity and fine craftsmanship of its maker and author. A play or a moving picture may not be judged, even by Government authority, solely upon the basis of the orthodoxy of its doctrine. Excellence of workmanship, seriousness and sincerity of purpose and aesthetic values may invest the work with social importance which the constitution protects. *Roth* v. *U. S.* 354 U. S. 476 at p. 498.

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[23] See also discussion at pp. 7-9 of this brief.

"The established reputation of the work and the estimation of approved critics" is still another factor that must be considered in determing whether the public must be protected against a motion picture.[24] (*U. S.* v. *One Book entitled Ulysses*, 72 F. 2d 705, 708)

We believe the affirmative values of the film far outweigh the considerations that impelled the censor to suppress it and that the possibility of harm resulting from the showing of the picture is not sufficiently grave to justify the limitation on the freedom of the press implicit in preventing its exhibition.

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[24] "'Lady Chatterley's Lover' is not only a work of serious purpose but also a work of high achievement. Whether it is as great a novel as some critics thought when it was first published is arguable. The characters are sometimes symbols rather than human beings and the propaganda purpose occasionally shows through." Archibald MacLeish, letter preface to "Lady Chatterley's Lover," Grove Press (1959).

"It ("Lady Chatterley's Lover") is the most inspiriting book from England that I have seen in a long time; and—in spite of Lawrence's occasional repetitiousness and his sometimes rather overdone slapdash tone—one of the best written." Edmund Wilson: "Lady Chatterley's Lover", in The Shores of Light, p. 405. (Matter in parenthesis ours.)

"Much of what is happening in Europe today (1938) and yet more that will doubtless happen in the future are the brutal reactions of mass humanity to the problems which the exceptional man, the genius D. H. Lawrence, perceived and faced and fought against in his own way: in his writings, a great part of which in any case will pass into the heritage which our age will hand on to future generations." Sigrid Undset in, The Achievement of D. H. Lawrence, by Hoffman and Moore, p. 62.

"He was a clever man, as well as a man of genius." Aldous Huxley, *Id.*, p. 69.

"I live in hopes that Lawrence's recognition is at last to come—to come after all in my life-time: I mean, his recognition for what I am convinced he is: the great creative genius of our age, and one of the greatest figures in English literature." F. R. Leavis: Scrutiny, Vol. XVIII, p. 66.

Conclusion

1. Sections 122, 122-a, 126, 129 and 131 of the Education Law of the State of New York should be declared void on the ground that they set up a system of licensing and prior restraint of communication prohibited by the First and Fourteenth Amendments.

2. If the foregoing relief is not granted, Sections 122 and 122-a.1 of the New York Education Law should be held void to the extent that they permit the suppression of a motion picture on the ground that it is immoral or of such character that its exhibition would tend to corrupt morals.

3. If both the foregoing requests for relief are denied, the order of the New York Court of Appeals in this case should be reversed on the ground that there was no justification or warrant for the ban of the moving picture "Lady Chatterley's Lover".

Respectfully submitted,

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APPENDIX

The Statutes Involved

Education Law—Article 3

PART II—MOTION PICTURE DIVISION

§120. Motion picture division continued; organization

There shall continue to be in the education department a motion picture division. The head of such division shall be a director, who shall be appointed by the regents, upon the recommendation of the commissioner of education. The regents may consolidate such division with the division of visual instruction or may assign to the motion picture division the functions, powers and duties of other divisions, bureaus or officers in the department. The board of regents, upon the recommendation of the commissioner of education, shall appoint such officers and employees as may be needed and prescribe the powers and duties and, within the limits of the appropriations made therefor, fix the compensation of such director, officers and employees. All expenses actually and necessarily incurred in the performance of their duties shall be allowed to such director, officers and employees. McKinney's Consolidated Laws of New York. Book 16, Part 1, page 23.

§122. Licenses

The director of the division or, when authorized by the regents, the officers of a local office or bureau shall cause to be promptly examined every motion picture film submitted to them as herein required, and unless such film or a part thereof is obscene, indecent, immoral, inhuman, sacrilegious, or is of such a character that its exhibition would tend to

corrupt morals or incite to crime, shall issue a license therefor. If such director or, when so authorized, such officer shall not license any film submitted, he shall furnish to the applicant therefor a written report of the reasons for his refusal and a description of each rejected part of a film not rejected in toto. McKinney's Consolidated Laws of New York, Book 16, Part 1, page 24.

§122-a. Definitions

1. For the purpose of section one hundred twenty-two of this chapter, the term "immoral" and the phrase "of such a character that its exhibition would tend to corrupt morals" shall denote a motion picture film or part thereof, the dominant purpose or effect of which is erotic or pornographic; or which portrays acts of sexual immorality, perversion, or lewdness, or which expressly or impliedly presents such acts as desirable, acceptable or proper patterns of behavior.

2. For the purpose of section one hundred twenty-two of this chapter, the term "incite to crime" shall denote a motion picture the dominant purpose or effect of which is to suggest that the commission of criminal acts or contempt for law is profitable, desirable, acceptable, or respectable behavior; or which advocates or teaches the use of, or the methods of use of, narcotics or habit-forming drugs. McKinney's Consolidated Laws of New York, Book 16, Part 1, 1958 Cumulative Annual Pocket Part, page 11.

§123. Permits

1. "Current event" films. All films exclusively portraying current events or pictorial news of the day, commonly

called news reels, or excerpts from the public press, may be exhibited without inspection and no permits or fees shall be required therefor.

§[1] 2. Scientific and educational films. Such director or, when authorized, such officer shall issue a permit for every motion picture film of a strictly scientific character intended for use by the learned professions, without examination thereof, provided that the owner thereof, either personally or by his duly authorized attorney or representative, shall file the prescribed application which shall include a sworn description of the film and a statement that the film is not to be exhibited at any private or public place of amusement.

3. Such director or, when so authorized, such officer may, in his discretion, without examination thereof, issue a permit for any motion picture film intended solely for educational, charitable or religious purposes, or by any employer for the instruction or welfare of his employees, provided that the owner thereof, either personally or by his duly authorized attorney or representative, shall file the prescribed application, which shall include a sworn description of the film. No fee shall be charged for any such permit. McKinney's Consolidated Laws of New York. Book 16, Part 1, pages 27-28.

§124. Review by regents

An applicant for a license or permit, in case his application be denied by the director of the division or by the officer authorized to issue the same, shall have the right of review by the regents. The regents, however, by rule may provide that such reviews may be heard and determined

by a committee of the regents, the commissioner of education, the deputy commissioner of education or an assistant commissioner of education. A determination upon such review refusing a license shall be reviewable by a proceeding under article seventy-eight of the civil practice act[1] at the instance of the applicant. McKinney's Consolidated Laws of New York, Book 16, Part 1, page 29.

§125. Permits revocable

Any permit issued as provided in part two of this article or as provided in chapter seven hundred fifteen of the laws of nineteen hundred twenty-one may be revoked by such director or officer authorized to issue the same five days after notice in writing is mailed to the applicant at the address named in the application. Thereafter any such film may be submitted to such director or authorized officer only in the manner provided for license. McKinney's Consolidated Laws of New York, Book 16, Part 1, page 31.

§126. Fees

The director or authorized officer of such division shall collect from each applicant for a license or a permit, except as otherwise expressly provided in part two of this article, a fee of three dollars for each one thousand feet or fraction thereof of original film and two dollars for each additional copy thereof licensed or permitted by him. The revocation or cancellation of any license or permit issued shall not entitle the grantee thereof to the return of any fee paid. All fees received by such director or authorized officer shall be paid monthly into the general fund of the treasury of the state of New York. McKinney's Consolidated Laws of New York, Book 16, Part 1, page 32.

§129. Unlawful use or exhibition

It shall be unlawful to exhibit, or to sell, lease or lend for exhibition at any place of amusement for pay or in connection with any business in the state of New York, any motion picture film or reel, other than those specified in subdivision one of section one hundred twenty-three, unless there is at the time in full force and effect a valid license or permit therefor of the education department and unless such film or reel shall contain for exhibition upon the screen identification matter in the substance, style and length which such department shall prescribe.

This section shall not be construed to prohibit the making of an executory contract for the sale or leasing of a film or films, provided the film shall have been licensed under the provisions of part two of this article and the license seal attached at the time of delivery. McKinney's Consolidated Laws of New York, Book 16, Part 1, page 33.

§130. Posters, banners, et cetera

No person or corporation shall exhibit or offer to another for exhibition purposes any poster, banner or other similar advertising matter in connection with any motion picture film, which poster, banner or matter is obscene, indecent, immoral, inhuman, sacrilegious or of such a character that its exhibition would tend to corrupt morals or incite to crime. If such poster, banner or similar advertising matter is so exhibited or offered to another for exhibition, it shall be sufficient ground for the revocation of any permit or license issued by the education department. McKinney's Consolidated Laws of New York, Book 16, Part 1, page 34.

§131. Penalty

A violation of any provision of part two of this article shall be a misdemeanor. McKinney's Consolidated Laws of New York, Book 16, Part 1, page 34.

§132. Enforcement; rules and regulations

The board of regents shall have authority to enforce the provisions and purposes of part two of this article; but this shall not be construed to relieve any state or local peace office in the state from the duty otherwise imposed of detecting and prosecuting violations of the laws of the state of New York. In carrying out and enforcing the purposes of part two of this article, the regents may make all needful rules and regulations. McKinney's Consolidated Laws of New York, Book 16, Part 1, page 35.

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Supreme Court of the United States

OCTOBER TERM 1958

No. 394

KINGSLEY INTERNATIONAL PICTURES CORPORATION,

Appellant,

vs.

THE REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,

Appellees.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR APPELLEES

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No. 394

KINGSLEY INTERNATIONAL PICTURES CORPORATION,

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BRIEF FOR APPELLEES

Statement of the Case

The four major characters in the film "Lady Chatterley's Lover" are Lady Chatterley, her lover, Mellors, who is a gamekeeper of the estate, the wife of Mellors and the wife's lover. With little left to the imagination, the story presents in great detail the adulterous love affair between Lady Chatterley and Mellors which occurs subsequent to, but apparently not in compliance with, Sir Clifford Chatterley's suggestion to her that in view of his war injury which left him impotent, she have a child by another man to provide him with an heir to his title and estate. As a result of the affair, Lady Chatterley becomes pregnant with Mellors' child and in the final scenes leaves her husband

without a legal divorce or separation to join Mellors as his mistress. To expand this sketchy story there has been added several scenes of intense love making between Lady Chatterley and Mellors and between Mellors' wife and another man, scenes whose dominant purpose is to add to the pornography, immorality and obscenity of the film.

When the film was originally presented to the Motion Picture Division, the Division after review, directed the elimination of three scenes as follows:

> "Reel 2D—Eliminate all views of Mellors and Lady Chatterley in cabin from point where they are seen lying on cot together, in a state of undress to end of sequence."
>
> "Reel 3D—Eliminate all views of Mellors caressing Lady Chatterley's buttock and all views of him unzipping her dress and caressing her bare back. Eliminate following spoken dialogue accompanying these actions:
>
> 'Mais tu es nue * * * Tue es nue sous ta robe, et tu ne le disais pas Qu'est-ceque to as?'
>
> 'But you're nude * * * you're nude under your * * * dress, and you didn't say so * * * What is it?'"

Eliminate accompanying English superimposed titles:

> "'You have nothing on * * *'
> 'And you didn't say so * * *'
> 'What is it?'"
>
> "Reel 4D—Eliminate entire sequence in Mellors' bedroom, showing Lady Chatterley and Mellors in bed, in a state of undress.
>
> Reason: 'Immoral' within the intent of our law." [R. 10]

The petitioner appealed from the determination of the Division in this respect to the Regents. After review of the film by a Committee of the Board of Regents, the Committee rendered its opinion which held that the three sequences specifically referred to by the Division were

immoral under Sections 122-122a and further, that the whole theme of the picture is immoral in that the theme is the presentation of adultery as a desirable, acceptable pattern of behavior and affirmed the determination of the Division.

The Board of Regents thereafter considered the recommendation of the Committee and voted that the determination denying the license for the motion picture be affirmed.

Thereafter, appellant instituted a proceeding in the courts. The Supreme Court of the State of New York, Appellate Division, Third Department annulled the determination of the Regents. The Court of Appeals of the State reversed and confirmed the decision of the Board of Regents.

POINT I

New York State can constitutionally prohibit exhibition of motion pictures which depict scenes of sexual immorality and can prohibit the exhibition of a motion picture which presents sexual immorality as a desirable pattern of behavior.

While the appellant has reiterated in the brief presented in this case the same arguments and cited the same cases as have been presented to this Court in various motion picture cases heretofore, it is important at the outset to understand that the issues in this case are new and have not been determined heretofore. The framework and limits of the issues have, however, been set down by this Court and such issues fall squarely within such framework. In the Burstyn case, *Matter of Burstyn* v. *Wilson*, 343 U. S. 495, two matters were settled:

1. That previous restraint is not unconstitutional under certain circumstances and

2. That the states are at liberty to carry on previous restraint providing a clear and unambiguous law constitutes the basis for the same. It is understood, of course, that the area of censorship must be one where restraint at any stage, before or after, is justified.

So, following these definite conclusions by this Court the Legislature of New York undertook to write a statute which would meet these specifications.

One of the fields where no argument can exist, that some type of supervision can be exercised by a state, is "immorality" and, particularly where such term embraces obscenity.

By unanimous action and with the complete endorsement of all educational and civic organization and with no objection from any source except certain motion picture interests, the term "immorality" was defined. Section 122-a of the Education Law of New York (see Appendix) defines "immorality". The areas are split into various parts, no one part being dependent upon another. The Regents have concluded that this picture contravenes two specific definitions of the term, viz. (1) that it portrays acts of sexual immorality and (2) that it "expressly or impliedly presents such acts (viz. sexual immorality) as desirable, acceptable or proper patterns of behavior." Consequently, the sole and narrow issues before this Court are (1) whether this picture, in fact, contravenes the express statutory standards of immorality as specifically defined and (2) as a corollary whether the standards as defined are sufficiently concrete, clear and unambiguous.

The full definition is not before this Court—only these parts of the definition as cited—and any debate as to

whether other parts of the definition are a proper standard has no bearing in this case.

Governor Dewey, it is to be noted, in signing the measure which enacted section 122-a indicated that the Legislature, representing the people of New York, had this Court's position in the *Burstyn* case clearly in mind and that the enactment of this statute was to bring the Motion Picture Law in dealing with immorality within the criteria set forth in the *Burstyn* case. In his memorandum he stated:

> "* * * Recent Supreme Court decisions have indicated that the term 'immoral' may not be sufficiently definite for constitutional purposes. The primary purpose of this bill is to define 'immoral' and 'tend to corrupt morals' in conformance with the apparent requirements of these cases. It does so by defining them in terms of 'sexual immorality.' The words selected for this definition are based on judicial opinions which have given exhaustive and reasoned treatment to the subject. * * *
>
> "The language of the Supreme Court of the United States, in a recent opinion of this precise problem, should be noted: 'To hold that liberty of expression by means of motion pictures is guaranteed by the First and Fourteenth Amendments, however, is not the end of our problem. *It does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places.*' [*Burstyn* v. *Wilson*, 72 S. Ct. 777, 343 U. S. 495, at 502, 96 L. Ed. 1098]. So long as the State has the responsibility for interdicting motion pictures which transgress the bounds of decency, we have the responsibility of furnishing guide lines to the agency charged with enforcing the law. * * * " (Emphasis supplied)

The motion picture division in its original action set forth specifically the scenes which it regarded as representing sexual immorality. This determination of the motion picture division was confirmed by the Board of Regents.

The Board of Regents further concluded that not only were the scenes indicated a portrayal of sexual immorality but also that the whole picture presented adultery as a desirable, acceptable and proper pattern of behavior. The term sexual immorality is and has on numerous occasions been held to be synonymous with the term obscenity,[1] and while the Regents were utilizing the statutory language, it has been their consistent position that within this term the picture or at least those parts of it to which reference is made, is obscene.

This Court has clearly indicated in recent decisions that society is not powerless to protect itself from the degradation of lewd publication. In *Kingsley Books, Inc.* v. *Brown*, 354 U. S. 436, 1 L. Ed. 2d. 1469, 77 S. Ct. 1325, which involved restraint by an injunction Mr. Justice Frankfurter said in the prevailing opinion:

> "* * * In an unbroken series of cases extending over a long stretch of this Court's history, it has been accepted as a postulate that 'the primary requirements of decency may be enforced against obscene publications.' Id. 283 U. S. at 716. And so our starting point is that New York can constitutionally convict appellants of keeping for sale the booklets incontestably found to be obscene. *Alberts* v. *California*, decided this day [1 L. 2d 1498]. The immediate problem then is whether New York can adopt as an auxiliary means of dealing with such obscene merchandising the procedure of § 22-a. [New York Code of Criminal Procedure.]
>
> "We need not linger over the suggestion that something can be drawn out of the Due Process Clause of

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[1] *U. S.* vs. *Keller* D. C. Pa. 158 F. Supp. 940, 943.
U. S. v. *One Book Entitled "Ulysses"* by James Joyce C. C. A. N. Y. 72 F. 2d 705, 707.
Duncan vs. *U. S.*, C. C. A. Or. 48 F. 2d 128, 132.
Swearingen v. *United States* 161 U. S. 446, 451.

the Fourteenth Amendment that restricts New York to the criminal process in seeking to protect its people against the dissemination of pornography. It is not for this Court thus to limit the State in resorting to various weapons in the armory of the law. * * * Just as *Near* v. *Minnesota*, 283 U. S. 697, 75 L. ed. 1357, 51 S. Ct. 625, *supra*, one of the landmark opinions in shaping the constitutional protection of freedom of speech and of the press, left no doubts that 'Liberty of speech, and of the press, is also not an absolute right,' 283 U. S. at 708, it likewise made clear that '*the protection even as to previous restraint is not absolutely unlimited.*' Id. 283 U. S. at 716. To be sure, the limitation is the exception; it is to be closely confined so as to preclude what may fairly be deemed licensing or censorship. (Emphasis supplied)

"The judicial angle of vision in testing the validity of a statute like § 22-a is 'the operation and effect of the statute in substance.' Id. 283 U. S. at 713. The phrase 'prior restraint' is not a self-wielding sword. Nor can it serve as a talismanic test. The duty of closer analysis and critical judgment in applying the thought behind the phrase has thus been authoritatively put by one who brings weighty learning to his support of constitutionally protected liberties: 'What is needed,' writes Professor Paul Freund, 'is a pragmatic assessment of its operation in the particular circumstances. The generalization that prior restraint is particularly obnoxious in civil liberties cases must yield to more particularistic analysis.' The Supreme Court and Civil Liberties, 4 Vand. L. Rev. 533, 539. * * *"

This Court has recognized the power of the State by the exertion of its police power to suppress obscenity.

"There are certain well defined and narrowly limited classes of speech *the prevention and punishment* of which *have never been thought* to raise any constitutional problem." [*Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571, 572, 86 L. Ed. 1031, 1035.]

"In maintaining this guaranty [liberty of the press and speech], the authority of the State to enact laws to promote the health, safety, *morals* and general wel-

> fare of its people is necessarily admitted." (*Near* v. *Minnesota*, 283 U. S. 697, 707, 51 S. Ct. 625, 628) (Emphasis added.)

In upholding the constitutionality of the licensing statute, the New York Court of Appeals reaffirmed the State's "primary responsibility for the preservation of the basic morality of its people." The Court of Appeals refused "to confer a license to corrupt."

The basic morality of the people of this State is well known. The appellant had ample knowledge of the moral code which it seeks to ridicule and debase. Adultery is the sole ground for divorce in New York State [Civ. Prac. Act §1147]; adultery is a crime in New York as in many states of the Union [Penal Law § 101]. As stated by Judge Conway in the opinion in the present case: "Indeed adultery has been decreed to be immoral since Moses received the Commandments on Mount Sinai."

The legislature in tying immorality in this part of the definition to sexual immorality sets up a clear standard and unless it is expected that the legislature describe all acts of sexual immorality in so many words, there can be no clearer statement than the expression used.

In *Roth* vs. *United States*, 354 U. S. 476, in upholding the power of the State to control obscenity, this Court pointed out that the erection of rigid definitions is an impossible task. Mr. Justice Brennan, when speaking for the Court in the Roth case, said:

> "This Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process '[T]he Constitution does not require impossible standards'; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practice * * *'."

It cannot be debated and as a matter of fact we think it is practically conceded by the appellants here that this picture does contravene the part of the definition which prohibits the exhibition in New York State of motion pictures which portray sexual immorality as a desirable pattern of life. We make no attempt to debate here concerning adultery as such. That adultery is sexually immoral goes without question. That adultery is not an acceptable pattern of behavior is so universally held in almost every country of the world that we regard it unnecessary to belabor it. Furthermore, the statutory prohibition upon the exhibition of pictures in the language set forth here relative to adultery is so clear and specific that it is not subject to argument.

It is much plainer and more unambiguous than any language we can develop to attempt to establish such fact. Therefore, our position in this case is, as indicated, a very simple one. Factually, the picture shows scenes which are sexually immoral and as such obscene. The picture in its entirety presents adultery in a manner contrary to the express and unambiguous terms of the statute. The Motion Picture Division and the Board of Regents have no option but to certify to the people of the State that the exhibition of this picture is in violation of express and definitive provisions of the statute. It is the Legislature which prohibits the exhibition of this picture; not the Motion Picture Division nor the Regents. If the Legislature is without power, constitution-wise, to prevent the exhibition of pictures for the specific reasons which they have given, that, of course, is one thing. It is our clear understanding, however, that this Court has already settled this matter and concluded that the states are not without power to regulate to prescribe standards in these areas.

Appellant argues that criminal prosecution is available to punish the showing of an obscene film. Yet if he is successful in compelling the Regents to license a film its obscenity can never be attacked in a criminal proceeding in New York State because Section 1141 of the Penal Law expressly exempts from such criminal prosecution a motion picture which has a license from the Department (N. Y. State Penal Law, Section 1141, Subd. 1).

POINT II

This Court has already defined the permissible area of regulation of motion pictures and New York State is acting within such area.

While we fully realize that the briefs of the appellant in this case have again presented arguments concerning the application of the First and Fourteenth Amendments to the United States Constitution to motion pictures we see no useful purpose to be gained in going into the application of these principles again. We believe the Court has these issues in mind; that the Court has determined that the rights guaranteed thereby are not infringed, by a state insisting that before motion pictures are presented in theatres for pay they not be immoral. We do not think that the statute doing just this violates either the State or the Federal Constitutions. We see no further point in expanding these principles.

Judge Conway of the Court of Appeals presents to this Court a scholarly and most carefully thought-out opinion which goes into these matters fully. A great deal of research was made and the authorities fully explored. We do not think that exemplification on our part can add anything to that decision. We rest squarely on it.

Conclusion

In conclusion we are sure that the Court recognizes that the Board of Regents of New York State in administering the Motion Picture Law is endeavoring to carry out its statutory duties as laid down in law. When the administration of such law was assigned to the Department in 1927 the Regents were dubious as to the need for review of motion pictures by an administrative educational agency. In order to understand the complexities of a matter as important and far-reaching as this, one has to live with it. A stranger casually examining the problem without background is in no position to pass lightly on the matter. So after the Regents became experienced with the issues and noting the many types of pictures which clearly needed regulation, they changed their viewpoint entirely and concluded that the public interest was without question best served by a regulatory statute of this type. The members of the Board of Regents are as will be noted lawyers, doctors, farmers, bankers, brokers—in fact, are drawn from all walks of life although curiously enough, there has never been a clergyman serving on the board—at least during the administration of this Motion Picture Law. They are not professional educators nor moralists. They represent the thinking of a cross-section of the people of the State and their experienced opinion in respect to a matter of this type under these circumstances should be entitled to a great deal of weight.

It must be evident to this Court that there should be a clear breaking point between the limits of free speech and free publication and the point where the exploitations of these great freedoms injure and destroy the real precious heritage of the people, which is their own right to live amid moral and decent surroundings. In other words there is a

freedom which the Constitution certainly gives to people to have themselves and their children protected against exploitations of this nature. Perhaps there are some areas where certain exploitations do not ever reach the point where they are injurious. It would seem as though the Legislature of the State in setting up standards could explicitly deal with sexual immorality and prohibit unlawful exhibition of the same.

The difference between this case and all the others that have been presented to this Court it seems to us, rests at this level. The Legislature and the People of the State are quite familiar with the Court's position in the *Burstyn* case. The Legislature unanimously and with no objection of the people of the State and actually with their full approbation in the light of the *Burstyn* case, instructed the Regents to refuse to license pictures which dealt with sexual immorality. The Legislature could have left this work to the Courts. For the many reasons which have already been cited to this Court the people of the State concluded that the best way to handle the situation was to place in the hands of a body of the type represented by the Board of Regents this responsibility. The Legislature provided that such board action could be fully reviewed by the courts and if the Regents become arbitrary this is a complete remedy. It would seem that it should be left to the people of the State of New York to have the right to determine the *method* of the handling of a situation of this type. We can assure the Court that over the many years during which the regents have exercised this responsibility they have received nothing but praise from the people. The only ones who have complained are those who wish to present salacious material to the public for golden shekels. Everybody is familiar with the type of story this picture presents. Everybody knows that the original version was not permitted to

be brought into the United States. Everybody knows that the depicting of this story in the flesh is a more vivid, much stronger and franker presentation than the printed page. Certainly many of the scenes as depicted are as close to indecency, obscenity and immorality as such as one can get without portraying the specific acts of sexual intercourse. If the only restriction that is possible relates to the latter, than there is nothing wrong with this picture. Otherwise this picture is bad.

It would seem that where the Legislature and the people of this State as a matter of policy seek to find a way to preserve freedom from exploitation of filth that the usual rules of presumption of validity of their legislative acts should be given great weight by this Court.

Therefore, the decision of the New York Court of Appeals, upholding the constitutionality of the State system of licensing motion pictures, should be affirmed.

Respectfully submitted,

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APPENDIX

THE STATUTES INVOLVED

Education Law—Article 3

Part II—Motion Picture Division

§ 120. *Motion picture division continued; organization.* There shall continue to be in the education department a motion picture division. The head of such division shall be a director, who shall be appointed by the regents, upon the recommendation of the commissioner of education. The regents may consolidate such division with the division of visual instruction or may assign to the motion picture division the functions, powers and duties of other divisions, bureaus or officers in the department. The board of regents, upon the recommendation of the commissioner of education, shall appoint such officers and employees as may be needed and prescribe the powers and duties and, within the limits of the appropriations made therefor, fix the compensation of such director, officers and employees. All expenses actually and necessarily incurred in the performance of their duties shall be allowed to such director, officers and employees.

§ 122. *Licenses.* The director of the division or, when authorized by the regents, the officers of a local office or bureau shall cause to be promptly examined every motion picture film submitted to them as herein required, and unless such film or a part thereof is obscene, indecent, immoral, inhuman, sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime, shall issue a license therefor. If such director or, when so authorized, such officer shall not license any film submitted, he shall furnish to the applicant therefor a writ-

ten report of the reasons for his refusal and a description of each rejected part of a film not rejected *in toto*.

§ 122-a. *Definitions.* 1. For the purpose of section one hundred twenty-two of this chapter, the term "immoral" and the phrase "of such a character that its exhibition would tend to corrupt morals" shall denote a motion picture film or part thereof, the dominant purpose or effect of which is erotic or pornographic; or which portrays acts of sexual immorality, perversion, or lewdness, or which expressly or impliedly presents such acts as desirable, acceptable or proper patterns of behavior.

2. For the purpose of section one hundred twenty-two of this chapter, the term "incite to crime" shall denote a motion picture the dominant purpose or effect of which is to suggest that the commission of criminal acts or contempt for law is profitable, desirable, acceptable, or respectable behavior; or which advocates or teaches the use of, or the methods of use of, narcotics or habit-forming drugs.

§ 123. *Permits.* 1. "Current event" films. All films exclusively portraying current events or pictorial news of the day, commonly called news reels, or excerpts from the public press, may be exhibited without inspection and no permits or fees shall be required therefor.

*§ 2. *Scientific and educational films.* Such director or, when authorized, such officer shall issue a permit for every motion picture film of a strictly scientific character intended for use by the learned professions, without examination thereof, provided that the owner thereof, either personally or by his duly authorized attorney or representative,

*So in original. [Section symbol probably should be omitted.]

shall file the prescribed application which shall include a sworn description of the film and a statement that the film is not to be exhibited at any private or public place of amusement.

3. Such director or, when so authorized, such officer may, in his discretion, without examination thereof, issue a permit for any motion picture film intended solely for educational, charitable or religious purposes, or by any employer for the instruction or welfare of his employees, provided that the owner thereof, either personally or by his duly authorized attorney or representative, shall file the prescribed application, which shall include a sworn description of the film. No fee shall be charged for any such permit.

§ 124. *Review by regents.* An applicant for a license or permit, in case his application be denied by the director of the division or by the officer authorized to issue the same, shall have the right of review by the regents. The regents, however, by rule may provide that such reviews may be heard and determined by a committee of the regents, the commissioner of education, the deputy commissioner of education or an assistant commissioner of education. A determination upon such review refusing a license shall be reviewable by a proceeding under article seventy-eight of the civil practice act at the instance of the applicant.

§ 125. *Permits revocable.* Any permit issued as provided in part two of this article or as provided in chapter seven hundred fifteen of the laws of nineteen hundred twenty-one may be revoked by such director or officer authorized to issue the same five days after notice in writing is mailed to the applicant at the address named in the application. Thereafter any such film may be submitted to such

director or authorized officer only in the manner provided for license.

§ 126. *Fees.* The director or authorized officer of such division shall collect from each applicant for a license or a permit, except as otherwise expressly provided in part two of this article, a fee of three dollars for each one thousand feet or fraction thereof of original film and two dollars for each additional copy thereof licensed or permitted by him. The revocation or cancellation of any license or permit issued shall not entitle the grantee thereof to the return of any fee paid. All fees received by such director or authorized officer shall be paid monthly into the general fund of the treasury of the state of New York.

§ 129. *Unlawful use or exhibition.* It shall be unlawful to exhibit, or to sell, lease or lend for exhibition at any place of amusement for pay or in connection with any business in the state of New York, any motion picture film or reel, other than those specified in subdivision one of section one hundred twenty-three, unless there is at the time in full force and effect a valid license or permit therefor of the education department and unless such film or reel shall contain for exhibition upon the screen identification matter in the substance, style and length which such department shall prescribe.

This section shall not be construed to prohibit the making of an executory contract for the sale or leasing of a film or films, provided the film shall have been licensed under the provisions of part two of this article and the license seal attached at the time of delivery.

§ 130. *Posters, banners, et cetera.* No person or corporation shall exhibit or offer to another for exhibition pur-

poses any poster, banner or other similar advertising matter in connection with any motion picture film, which poster, banner or matter is obscene, indecent, immoral, inhuman, sacrilegious or of such a character that its exhibition would tend to corrupt morals or incite to crime. If such poster, banner or similar advertising matter is so exhibited or offered to another for exhibition, it shall be sufficient ground for the revocation of any permit or license issued by the education department.

§ 131. *Penalty.* A violation of any provision of part two of this article shall be a misdemeanor.

§ 132. *Enforcement; rules and regulations.* The board of regents shall have authority to enforce the provisions and purposes of part two of this article; but this shall not be construed to relieve any state or local peace office in the state from the duty otherwise imposed of detecting and prosecuting violations of the laws of the state of New York. In carrying out and enforcing the purposes of part two of this article, the regents may make all needful rules and regulations.